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# **Defamation and Freedom of Expression**

**Selected documents**

**Media Division  
Directorate General of Human Rights**

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Media Division  
Directorate General of Human Rights  
Council of Europe  
F-67075 Strasbourg Cedex

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## **PART A: Regional Conference on Defamation and Freedom of Expression – Documents**

### **I. Conclusions**

A regional Conference on defamation and freedom of expression bringing together public officials, judges and media professionals from South-East European countries was organised by the Council of Europe in Strasbourg on 17-18 October 2002 within the framework of the Stability Pact for South-Eastern Europe.

At the end of the Conference, **the participants noted:**

- that the laws on defamation and insult in some countries in South-Eastern Europe fail to give sufficient weight to the right to freedom of expression;
- that even where these laws are satisfactory, the practice of implementing them often fails to give sufficient weight to the right to freedom of expression;
- that public officials and others sometimes abuse these laws;
- that the judiciary is not always fully independent;
- that, in addition, the judiciary does not always follow the case law of the European Court of Human Rights concerning freedom of expression and information;
- that the media do not always exercise responsibility in reporting;
- that intergovernmental as well as international and national non-governmental organisations have an important role to play in encouraging the practice of the right to freedom of expression and responsible journalism.

Against this background, **the overwhelming majority of the participants recommended:**

- that defamation and insult should be decriminalised.

Furthermore, **the participants unanimously recommended:**

- that, if public authorities nevertheless decide to maintain criminal sanctions, there should be no imprisonment for defamation, a moratorium should immediately be applied where such sentences have already been handed down by national courts and financial penalties should be proportionate. Similarly, in the case of civil proceedings, compensation should be proportionate, in order not to have a chilling effect on freedom of expression and information;
- that there should be a defence of truth. There should also be a defence of fair comment where journalists have acted reasonably and in good faith;
- that the burden of proof should in principle rest with the plaintiff in cases of defamation. Where the burden of proof is placed on the defendant, the latter should be able to be exonerated from his/her responsibility if he/she is able to provide reasonable evidence that he/she had acted reasonably and in good faith;

- that there should be no special protection in both substantive and procedural laws or in practice for public officials (including Heads of State), in accordance with the jurisprudence of the European Court of Human Rights;
- that alternative effective remedies to litigation, such as mediation or the publication of an apology or a correction or a reply, should be encouraged in cases of defamation and insult in order to reduce the number of lawsuits on these grounds. Where such alternative remedies are obtained, it should not be possible to have recourse to court proceedings;
- that measures should be taken to prevent excessive litigations;
- that training activities should be organised for judges, prosecutors and lawyers on the European Convention on Human Rights and the case law of the European Court of Human Rights as well as its implementation at the domestic level;
- that the media should be encouraged to take cases to the European Court of Human Rights;
- that voluntary media codes of conduct should be drawn up and respected;
- that dialogue between judges, politicians and media professionals should be encouraged, including at the local level, in order to promote better mutual understanding about their respective duties and responsibilities and thereby reduce the risk of litigation;
- that intergovernmental as well as international and national non-governmental organisations should closely monitor the situation in European countries concerning the right to freedom of expression in general and defamation in particular. Non-governmental organisations should also provide legal assistance to media professionals who are prosecuted for defamation;
- that intergovernmental as well as international and national non-governmental organisations should take or support initiatives to align defamation laws and court practice in this area with the relevant international standards, including through the training of judges, lawyers and prosecutors and the training of media professionals;
- that intergovernmental and non-governmental organisations should take or support initiatives to promote responsible journalism through training and other activities;
- that, in order to be more effective in their work on the above-mentioned issues, intergovernmental and non-governmental organisations should establish better mechanisms for co-operation between themselves.

## II. Opening address by Mrs Maud De Boer-Buquicchio, Deputy Secretary General of the Council of Europe

Ladies and gentlemen,

Just a little more than two weeks ago, the Luxembourg chairmanship of the Council of Europe Committee of Ministers organised a conference entitled “The media in a democratic society: reconciling freedom of expression with the protection of human rights”.

In her statement at the conference, Ms Lydie Polfer, Chairman of the Committee of Ministers, underlined that those who govern should “*understand and accept that the ruling power cannot and must not dictate to the press the type of information that would suit it best. The media have the right, even the duty, to raise queries and to challenge those wielding the power vested in them by the people.*” Indeed, the threat of a prison sentence or of having to pay disproportionately high fines or damages can effectively discourage the media from exposing corruption and other wrongdoings in society. That is, in fact, self-censorship forced upon journalists.

In some countries, free expression is further threatened by defamation laws that, contrary to widely accepted European standards, provide special protection for the reputation of public officials, above that of “ordinary” citizens.

On the other hand, there are journalists who fail to check their facts before going public. There are still others whose work seems to be inspired not just by the pure search for truth. Such journalists not only compromise the name of the profession but also give some politicians arguments for limiting freedom of expression.

For the Council of Europe, full respect for the right of all individuals to receive and impart information, ideas and opinions, without interference by public authorities and regardless of frontiers, is a fundamental prerequisite for accession to the Organisation, in line with Article 10 of the European Convention on Human Rights. While Article 10 guarantees the right of freedom of expression, it also stipulates that this freedom “*carries with it duties and responsibilities*”. States may limit its exercise to protect the reputation or rights of others, as long as these limitations are “*prescribed by law and are necessary in a democratic society*”.

The big challenge here is to find the delicate balance between guaranteeing the fundamental right to freedom of expression and protecting the honour and reputation of persons. That is no easy task. The European Court of Human Rights, in its case law, has always paid special attention to achieving this balance.

The Court has repeatedly underlined that “freedom of expression constitutes one of the essential foundations of a democratic society”. In the *Castells* judgment of 1992, the Court said that a free press is one of the best means for the public to understand the ideas and attitudes of their political leaders. It allows everyone to participate in the free political debate which is at the very core of a democratic society.

The issue of defamation and freedom of expression has also been a recurring theme. In the *Lingens* case in 1986, the Court acknowledged that the press should not overstep the limits set for the “protection of the reputation of others”. At the same time, the Court em-

phasised the duty of the press to convey information and ideas on political issues and on other topics of public interest. “Not only does the press have the task of imparting such information and ideas”, the Court said, “the public also has a right to receive them.”

According to the Court, the limits of acceptable criticism are wider for a politician than for a private individual. Unlike private individuals, politicians consciously expose themselves to close scrutiny by both journalists and the public at large. Politicians must therefore display a greater degree of tolerance.

The Council of Europe fully realises the importance of these issues. It is now preparing a draft Declaration on freedom of political debate in the media. This document will formulate some basic principles concerning the balance between freedom of expression and the protection of the reputation and privacy of politicians and public officials. The group, working on the declaration, is headed by Mr Nicholas Hodgson, the General Rapporteur of your conference.

Having said all this, I would like to underline that the Council of Europe’s aim in organising today’s conference is not just to offer you yet another overview of European standards concerning defamation law and to take stock of the developments in South-Eastern Europe. The substantial effort and funding invested in the organisation of this conference will only be justified if your work here helps your countries and the region as a whole to find solutions to the problems that I mentioned earlier.

I am confident that, in part thanks to your efforts, the media in South-Eastern Europe will increasingly become the true, open forum for public discussion that they are supposed to be. The road towards this goal undoubtedly passes through the establishment of a proper regulatory framework in the area of defamation. A further major task ahead will be the day-to-day implementation of this framework according to European standards.

Journalists, on their part, should also protect the honour and reputation of others by following self-imposed rules of professional conduct. Carefully drafted and observed codes of journalistic ethics could eliminate to a great extent the need and desire by governments to impose restrictive regulations.

Obviously, the achievement of these goals will require the firm commitment of everyone in your countries, and in particular the public authorities, who will have to demonstrate a constant spirit of openness and accept public scrutiny and public criticism.

The Council of Europe, on the basis of its long-standing expertise in the area of media law and policy, will continue to take an active part in promoting freedom of expression and information. One, but not the only, appropriate framework for this is the Stability Pact Programme through which the Council of Europe provides a concrete contribution in this area.



For the countries that need it, we are always ready to provide our assistance for bringing defamation law and practice in line with European standards. In this perspective, the conclusions and recommendations which you will prepare at the end of the conference will be of great importance and I look forward to receiving them.

Finally, I would like to thank the Government of Luxembourg for providing the financial contribution, which has made this conference possible.

I wish you a successful discussion.

### III. Speech by Mr Christos L. Rozakis, Vice-President of the European Court of Human rights

Ladies and Gentlemen,

I am indeed glad to represent today the European Court of Human Rights in a conference, which will deal with the topical theme of defamation. I am confident that the papers that will be presented and the conclusions that will be reached in this conference will be carefully studied and assessed by the scientific world, by national or international authorities, by the media, but also by our Court, a court which seems to seek new insights in its approach to the issue of the conflict of two major values of our modern societies, that of the freedom of expression and that of the right to a good reputation.

It is an undisputed fact that the post-war democracies have attached considerable weight to one of the major conquests of the years of enlightenment, the freedom of expression, and more particularly the freedom of the media and press. In the case-law of the US Supreme Court, which may be considered one of the pioneers in the protection of this freedom, free expression has constantly outweighed all other considerations. Since its judgment in *New York Times v. Sullivan*, the Supreme Court has given unfettered protection to freedom of expression, including expression which may be vehement, caustic, and contain sharp attacks on government and public officials. In the name of this paramount freedom, it has restricted the level of liability for defamatory statements, especially for the press, always on the premise that the press is a pillar of democracy, which should not be prevented from disseminating information and criticising people, particularly those in public positions or in respect of matters of public concern. As one commentator rightly points out “the latitude given to journalists by the US Supreme Court extended up to the abolition of the common law presumption that defamation speech is false in cases where a plaintiff seeks damages against a media defendant for speech of public concern”. It seems to me that the all-embracing philosophy, which permeates the Supreme Court’s case-law is eloquently set out in the statement appearing in the case of *Gerts v. Welch*, when it is said:

“Under the First Amendment there is no such thing as a false idea. However pernicious an opinion has been, we depend for its corrections not on the conscience of judges and juries but on the competition of other ideas”.

The case-law of the European Court of Human Rights does not seem to depart considerably from the liberal approach of the U.S. Court. In the much acclaimed *Handyside* case, which constituted the *locus classicus* of this Court, and a source of inspiration for a great number of other judgments, it is clearly stated that the Convention not only protects information or ideas that are favourably received or regarded as inoffensive but also those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society. In this context the Court has nuanced, it is true, its approach on matters of permissible criticism, by accepting that the limits of freedom of expression may be different where criticism targets a politician, who is knowingly and willingly involved in matters of public concern, as compared to when it targets a private individual, not holding a public office, who only sporadically catches the public eye.

It must, however, be underlined that in cases of defamation, even concerning the latter category of individuals, the Court has tended to place freedom of expression in a position of a right expressly guaranteed by the Convention, while the protection of reputation – the other competing interest in defamation cases – has been simply considered as a ground of permissible restriction on the freedom protected by Article 10, which could be found as a justified interference to any expression if it was necessary in a democratic society. In other words, our Court, like the U.S. Supreme Court, has not raised the reputation of an individual to the status of a competing right, but only to the status of a possible ground justifying restrictions of freedom of expression under paragraph 2 of Article 10.

Yet, it seems that reputation is constantly gaining ground in the Court's case-law, and cases where defamation proceedings are before the Strasbourg organ receive increasing attention and consideration, be it cases under Article 8, concerning private life, or Article 10, concerning freedom of expression. It seems to me that a careful study of the Court's case-law of Article 8 may now produce an undisputed conclusion that the reputation of a person is considered to be a constitutive part of one's personality and, hence a private life right protected under Article 8. This development in our case-law, although not rubber-stamped as yet by a major judgment, but rather fragmentarily appearing in a number of cases may, also, play an important role in further tempering case-law on freedom of expression. It is a commonplace that where there is a conflict between two rights equally protected by the convention neither of them can neutralise the other through the adoption of any absolute approaches. They must co-exist through the necessary compromises, depending on the facts of each particular case. We are precisely at a stage of development of the Court's case-law where due regard is being given to these two paramount cornerstones of human rights protection in Europe.

My very schematic approach on the issue of freedom of expression and the right to reputation of individuals, be it politicians or anonymous people in the street is the focus of your today's conference. You realise from this succinct analysis that the Court which I represent has a legitimate interest to look closely at the work of your conference and be assisted by your conclusions. This is one of the reasons why I congratulate the organisers and wish to all of you success in your endeavour.

#### **IV. Speech by Mrs Anne Kayser, Deputy to the Permanent Representative of Luxembourg to the Council of Europe**

Mesdames, Messieurs,

J'ai l'immense honneur de prononcer ces quelques remarques d'introduction au nom de la Présidence luxembourgeoise du Comité des Ministres, à l'occasion de cette Conférence Régionale sur la diffamation et la liberté d'expression. Je souhaiterais saisir cette occasion pour réaffirmer l'intérêt et l'engagement accordé par le Gouvernement luxembourgeois à la promotion de la liberté de la presse et des médias au sens large.

Ce thème a en effet été retenu comme sujet central de notre semestre présidentiel. En témoigne entre autres la tenue de la Conférence sur «les Médias dans une société démocratique: quel équilibre entre la liberté d'expression et la protection des droits humains», organisée par la Présidence luxembourgeoise les 30 septembre et 1<sup>er</sup> octobre derniers.

Cet évènement figurait en bonne place parmi nos priorités, et confirme l'importance accordée par les autorités luxembourgeoises à la définition et à la protection de la liberté des médias en Europe, vecteur essentiel au dialogue civil et à la citoyenneté participative dans une société démocratique en pleine évolution.

Cette Conférence a réuni des experts venant de toute l'Europe afin de réfléchir sur les moyens de promouvoir et renforcer la liberté d'expression et d'information au niveau pan-européen. Je me permet de vous référer au document d'information disponible sous la côte CM/Inf(2002)40 qui reproduit notamment l'allocution de M<sup>me</sup> De Boer Buquicchio, Secrétaire Générale adjointe du CdE, le Rapport du Rapporteur général Aiden White, Secrétaire Général de la Fédération Internationale des Journalistes, ainsi que l'intervention de M<sup>me</sup> Lydie Polfer, Ministre des Affaires Etrangères du Luxembourg. Je vous renvoie également à la page Internet consacrée à cette Conférence sur le site du Conseil de l'Europe, où sont disponibles tous les discours prononcés lors de la Conférence, ainsi que d'autres documents d'information générale.

La réunion qui se tient aujourd'hui peut être considérée comme un prolongement direct de notre conférence pan-européenne, abordant le sujet de la liberté des médias dans un cadre géographique et thématique plus restreint. Nous nous permettons de relever que la conférence régionale à laquelle nous assistons aujourd'hui est financée grâce à des fonds alloués par le Gouvernement luxembourgeois. Elle s'inscrit ainsi dans le contexte d'un mémorandum de coopération signé entre la Ministre des Affaires Etrangères du Luxembourg et le Secrétaire Général du Conseil de l'Europe, visant à soutenir les activités de formation et de promotion mises en œuvre par la division des médias, sur la base d'un programme triennal de financements volontaires luxembourgeois.

Nous saluons particulièrement l'importance qui est accordée à cette région de l'Europe déchirée par des conflits violents et meurtriers, mais où la presse a persévéré dans son combat pour l'information malgré l'hostilité de l'environnement politique. La paix dans cette région ne pourra durablement s'installer qu'avec la participation active et l'appui déterminant des médias, instrument indispensable au développement et au maintien de la démocratie. Le Conseil de l'Europe, fidèle à ses objectifs de protection des droits fondamentaux, de promotion des valeurs démocratiques et de renforcement de l'état de droit, se doit d'apporter son soutien à la construction d'un cadre propice à la liberté d'expression en Europe du sud-est.

Il convient néanmoins de souligner que les nouvelles démocraties ne sont pas toujours les moins bien pourvues en matière de législation. Les anciens états membres doivent également accepter les critiques afin d'adapter leurs règles au contexte actuel et se conformer aux normes élaborées au sein du Conseil de l'Europe. Il en est ainsi avec le Luxembourg, qui est en train de se doter d'une nouvelle Loi sur la liberté d'expression dans les médias, afin de remplacer un texte dont la vétusté a été mise en évidence par un arrêt de la Cour Européenne des Droits de l'Homme très récent.

Permettez-moi de clore cette brève intervention en souhaitant que cette conférence, qui aborde des points essentiels, fasse l'objet de discussions fructueuses et productives, aboutissant à des conclusions constructives.

## V. Speech by Mr Peter Noorlander, Legal Officer, Article XIX

Free expression plays a vital role in the democratic process. Without a free flow of information and ideas, the public cannot formulate opinions about its government, elected officials and other matters of public interest. The media plays a particularly important role, providing the public with information and acting as a watchdog, exposing corruption and inspiring political debate. As the US Supreme Court has noted, “speech concerning public affairs is more than self-expression; it is the essence of self-government.”<sup>1</sup>

In many countries, defamation law represents one of the most serious threats to the open discussion which underpins democracy.<sup>2</sup> While most people agree defamation laws serve a legitimate purpose, political bodies and public figures often abuse these laws to silence their critics. In some cases, governments effectively muzzle debate and critical voices by invoking harsh defamation laws to fine or imprison members of the opposition and journalists. In others, the technicalities of litigation and the cost of defending defamation actions serve to chill free discussion on matters of public interest.

ARTICLE 19, the Global Campaign for Free Expression, has been working on reform of defamation laws around the world, including the South-East European region. In our experience, despite continuous lobbying both by NGOs and by international organisations such as the Council of Europe, defamation continues to be a major problem in the region.

In this paper, I will provide an overview of current law and practice in five countries in the region: Albania, Bulgaria, Montenegro, Romania and Serbia.<sup>3</sup> Together with our partners, we have been monitoring the situation in these countries; for each of them, rather than provide an exhaustive (and ultimately dry) overview of the law, I will summarise the most recent trends and developments. Then, I will identify certain common trends in the region. However, I would like to begin by restating some of the most pertinent international standards in this area, as crystallised in the ARTICLE 19 publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*.<sup>4</sup> I have several copies of *Defining Defamation* with me and it is available on our website.

### 1. International standards

A number of key standards relating to defamation law have emerged from the jurisprudence of the European Court of Human Rights, as well as the comparative jurisprudence of superior national courts and other regional and international human rights judicial bodies. As mentioned, we have collected these together within one publication, *Defining Defamation*, which, amongst other things, contains key principles dealing with criminal defamation, the status of public bodies and public officials, defamation defences and remedies. I shall discuss these in turn.

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<sup>1</sup> *Garrison v. Louisiana* 379 US 64 (1964) at 74-5

<sup>2</sup> For example, the newly appointed OAS Special Rapporteur on Freedom of Expression has stated that defamation will be one of his three focal points for the following year or so.

<sup>3</sup> I shall leave Croatia and Slovenia to the expert consideration of other Vesna Alaburic and Gojmir Bervar, later today and tomorrow.

<sup>4</sup> ARTICLE 19, London: 1999.

## 2. Criminal Defamation

One of the most serious problems in the area of defamation in Europe is the existence of criminal defamation laws in most countries, as well as the prevalence of their use in a number of Member States of the Council of Europe. The key problem with these laws is that a breach may lead to a custodial sentence or another form of harsh sanction, such as a suspension of the right to practise journalism. Even where these are rarely applied, the problem remains, since the severe nature of these sanctions means they cast a long shadow. Suspended sentences, common in some countries, also exert a significant chilling effect as subsequent breach within the prescribed period means that the sentence will be imposed. It is now well-established that unduly harsh penalties, of themselves, represent a breach of the right to freedom of expression even if circumstances justify some sanction for abuse of this right. For this reason, courts have been very reluctant to approve criminal defamation provisions.

Although the ECHR has never directly ruled on the legitimacy of criminal defamation laws, it has never upheld a prison sentence or other serious sanctions in that context. In *Castells v. Spain*, the ECHR reiterated that:

The dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.<sup>5</sup>

In the same case, the Court stated that criminal measures should only be adopted where States act “in their capacity as guarantors of public order” and where such measures are, “[i]ntended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith.”<sup>6</sup> It is significant that in that case, which involved a conviction for defamation, the Court referred to the application of criminal measures only as a means of maintaining public order, and not as a means of protecting reputations, the purpose of defamation laws.

ARTICLE 19 takes the position that all criminal defamation laws are contrary to the guarantee of freedom of expression.

Our principle 4(a) states:

All criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws. Steps should be taken, in those States which still have criminal defamation laws in place, to progressively implement this Principle.

However, in recognition of the fact that many countries do have criminal defamation laws which are unlikely to be repealed in the very near future, Principle 4(b) states:

As a practical matter, in recognition of the fact that in many States criminal defamation laws are the primary means of addressing unwarranted attacks on reputation, immediate steps should be taken to ensure that any criminal defamation laws still in force conform fully to the following conditions:

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<sup>5</sup> Judgment of 23 April 1992, Application No. 11798, at para. 46.

<sup>6</sup> *Ibid.*

- i. no-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below;
- ii. the offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed;
- iii. public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official;
- iv. prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practise journalism or any other profession, excessive fines and other harsh criminal penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.

### 3. Who can sue ?

National courts increasingly recognise that it is necessary to limit governmental abuse of defamation laws by restricting the scope of who may sue in defamation. Courts in the UK, for example, have held that public bodies do not have the right to bring an action for defamation. The House of Lords stated in relation to a county council that, as an elected body, it “should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.”<sup>7</sup>

Although the European Court has so far refrained from ruling out defamation actions by public bodies, it has noted:

The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician.<sup>8</sup>

The rationale for restricting the ability of elected bodies to sue is threefold. First, criticism of government is vital to the success of a democracy and defamation suits inhibit free debate about vital matters of public concern. Second, defamation laws are designed to protect reputations. Any reputation elected bodies might have would belong to the public as a whole, which on balance benefits from uninhibited criticism. In any case, elected bodies regularly change membership so, as the House of Lords has noted, “it is difficult to say the local authority as such has any reputation of its own.”<sup>9</sup> Finally, the government has ample ability to defend itself from harsh criticism by other means, for example by responding directly to any allegations. Allowing public bodies to sue is, therefore, an inappropriate use of taxpayers money, one which may well be open to abuse by governments intolerant of criticism.

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<sup>7</sup> *Derbyshire County Council v. Times Newspapers Ltd.* [1993] 1 All ER 1011 at 1017

<sup>8</sup> See, for example, *Incal v. Turkey*, 9 June 1998, Application No. 22678/93, at para 54.

<sup>9</sup> at 1020

ARTICLE 19 takes the position that public bodies should not be able to bring defamation actions, as reflected in its Principle 3:

Public bodies of all kinds – including all bodies which form part of the legislative, executive or judicial branches of government or which otherwise perform public functions – should be prohibited altogether from bringing defamation actions.

#### **4. Public Officials**

It is now well-established that public officials should tolerate more, not less, criticism than other people. This is based on two key factors. First, it is of the greatest importance that public officials, like public bodies, are subjected to open debate and criticism. Second, public officials have knowingly opened themselves up to criticism by their choice of profession.

It should be noted that this principle is of broad application. It applies, for example, to the manner in which complaints are lodged and processed, so that public officials, regardless of their rank, should not benefit from cases being taken by public prosecutors where this is not generally available. It also applies to the standards which are applied in determining whether a defendant is liable and the penalties which may be imposed.

#### **5. Defences**

A strong system of defences is essential if defamation laws are not unreasonably to restrict the free flow of information and ideas. The four defences noted below – drawn from international and comparative jurisprudence – are of particular importance.

First, it should be a complete defence to an allegation of defamation that the statements in question were true. One cannot protect a reputation one does not deserve and, where the impugned statements are true, there is no legitimate reputation to protect. This does not mean, however, that other causes of action, for example an invasion of privacy, may not be available. Where the statements involve a matter of public interest, the

Second, no one should be liable for a statement of opinion, defined as a statement which cannot be shown to be true or false or which cannot reasonably be interpreted as stating a fact (for example because it is rhetoric, satire or jest). Opinions are by definition subjective in nature and courts should not judge whether or not it is appropriate to articulate them. Furthermore, no one should be required to prove the truth of a statement of opinion, or value judgement.

Third, even where a statement of fact on a matter of public concern has been shown to be false, defamation defendants should benefit from a defence of reasonable publication. This defence is established if it is reasonable in all the circumstances for a person in the position of the defendant to have disseminated the material in the manner and form he or she did. The need for this rule is based on the harsh nature of the traditional rule in some jurisdictions according to which defendants are liable whenever they disseminate false statements, or statements which they cannot prove to be true.



This traditional rule is particularly unfair for the media, which are under a duty to satisfy the public's right to know and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information. A more appropriate balance between the right to freedom of expression and reputations is to protect those who have acted reasonably, while allowing plaintiffs to sue those who have not. For the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test.

Fourth, certain types of statements should never attract liability under defamation law, while other statements should be exempt from liability unless they can be shown to have been made with malice, in the sense of ill-will or spite. The former category should include, for example, statements made during judicial proceedings, statements before elected bodies and fair reports on such statements. The latter category should protect statements which the speaker is under a legal, moral or social duty to make. An example would be reporting of suspected crime to the police. In each of these cases, the public interest in the statements being made outweighs any private reputation interest in suppressing the statements.

## 6. Remedies

It has already been noted that the guarantee of freedom of expression prohibits disproportionate sanctions for defamatory statements. In our view, this requires the authorities to establish a regime of remedies which, while redressing the harm to reputation from defamatory statements, also exerts a minimal chilling effect on freedom of expression. Traditionally, the dominant remedy for defamation has been pecuniary in nature but monetary remedies often have a negative effect on the free flow of information. A variety of less intrusive but still effective alternative remedies exist – such as the issuance of an apology or correction, or the publication of a judgement finding the statements to be defamatory – which should be prioritised.

Pecuniary awards should be subject to legal limits, as well as process guarantees, to ensure that they do not become excessive. The tendency to constantly increase awards – illustrated by the situation in the UK a few years ago where those subjected to defamation received more money than plaintiffs who had been rendered quadriplegics – must be combated.

## 7. Country survey

### *Albania*

In Albania, defamation continues to fall under both criminal and the civil law. The Criminal Code includes five provisions that can be characterised as criminal defamation laws: simple insult, simple libel, insult of public officials related to their public function, libel of public officials related to their public function, and libel of the president of the republic.<sup>10</sup> Since the Criminal Code does not define 'insult', the courts have been free to provide their own interpretation.

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<sup>10</sup> Articles 119, 120, 239, 240, and 241.

Commentators report that, in some cases, ‘insult’ has been interpreted to include ‘humiliating, immoral or ridiculing words, images and gestures’, as well as satirical sketches. In others, defendants have reportedly been found guilty of ‘public insult’ for uttering insolent words in the presence of only six or seven people.<sup>11</sup> Maximum sentences of up to two years imprisonment are available; the sanctions available for insult against public officials are double those available for ‘simple’ insult.

While criminal defamation laws *per se* are inimical to freedom of expression, it is particularly worrying that under Albanian law, public officials enjoy enhanced protection. Such privileged standing of public officials goes against the established principle that public officials should tolerate greater criticism, not less. Moreover, public officials enjoy the assistance of public prosecutors in bringing cases.<sup>12</sup> These factors combine to have a seriously chilling effect on press freedom, one that deters investigative journalism and undermines the media’s public watchdog role.

Under Article 625 of the Albanian Civil Code, a person who has suffered ‘harm to the honour of his personality’ has a right to compensation. However, the Civil Code fails to provide a number of key definitions and standards, including on liability, burden of proof, and compensation. In particular, it is not clear whether there is a defence of good faith and there is very little guidance on the quantification of damages. This contributes to a tendency on the part of the courts to order highly punitive and disproportionate damage awards against journalists.

A recent study of defamation practice in Albania<sup>13</sup> found that the courts display an alarming lack of sensitivity to human rights standards, failing entirely to give due weight to the importance in a democratic society of the right to freedom of expression. Case law of the European Court of Human Rights is routinely ignored and even arguments based on the Albanian Constitution, which guarantees freedom of expression in Article 22, are not addressed. Worryingly, the courts do not appear to distinguish between statements of fact and statements of opinion, and presume bad faith in nearly all cases in which a journalist cannot absolutely prove the truthfulness of a statement. This includes those cases where a journalist refuses to disclose his or her sources. The study also found that defamation judgments tended to be poorly reasoned and failed to provide sufficient evidence to justify the criminal and civil sanctions that were imposed on the defendants. Plaintiffs often bring civil and criminal defamation actions simultaneously.

In many ways, the August 2000 case of *Kryemadhi v. Patozi* is indicative of the shortcomings of Albanian defamation law. Monika Kryemadhi, head of the Socialist Party youth organization and spouse of Prime Minister Ilir Meta, brought criminal and civil defamation charges against the editor-in-chief of *Rilindja Demokratike*, Astrit Patozi, and two reporters. The charges against Patozi concerned articles alleging that Kryemadhi had spent large sums of money at hotels, and questioned the source of these funds. The Tirana District Court held that since Patozi had produced no evidence to prove the truthfulness of his allegations, he was guilty.

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<sup>11</sup> I. Elezi, *Criminal Law, Special Part*, Vol. 1 pp. 119-120, quoted in the Human Rights Watch report.

<sup>12</sup> Private individuals bringing a criminal defamation case have to file their own complaint and prosecute the case themselves.

<sup>13</sup> *The Cost of Speech: Violations of Media Freedom in Albania*, Human Rights Watch: June 2002.

However, Patozi claimed that revealing the name of the hotel employee who provided the information would have serious repercussions for that person.

In addition, Patozi's counsel argued that shifting the burden of proof to the defendant – rather than requiring the plaintiff to prove both the falsity of the factual allegations and the defendant's malicious intent – violated the constitutional principle of the presumption of the defendant's innocence. In no way did the court acknowledge that the plaintiff's status as a public figure justified detailed scrutiny of her actions, particularly when the article alleged corruption, a matter of intense public debate and importance in post-communist Albania. Punitive as well as actual damages (civil and criminal) were awarded, totalling US\$5,000 (more than sixty times the average monthly wage in Albania). Patozi appealed but the trial judgment was upheld in full, the appeal court dismissing the defendant's presumption of innocence challenge as "unfounded in law". The appeal judgment did not discuss the other constitutional arguments raised and dismissed, without comment, Patozi's argument that the district court had violated his right not to disclose confidential sources. At the final appeal, the High Court dismissed the claim as 'inadmissible,' without hearing the parties and without providing reasons.

The Patozi High Court ruling is of concern because the case raised important issues of substantive criminal law, constitutional law and international human rights law. By dismissing the case at the admissibility stage without a hearing, the Albanian High Court was criticised for abusing this state of the proceedings to decide the merits of an appeal while avoiding debate and ignoring the need for a reasoned judgment. This also conveniently bypassed the need to hear a politically sensitive case. Most, if not all, recent appeals to the High Court in defamation cases have been dismissed in a similar fashion.<sup>14</sup>

### ***Bulgaria***

Under the civil law, both natural and legal persons may institute proceedings for insult, slander and libel. Natural persons can claim moral as well as material damages; legal persons can only claim material damages. The defendant bears the burden of proof on the issue of truth. Insult and slander are criminal offences under Articles 146-148 of the Criminal Code. Libel is part of 'aggravated slander', which includes slander 'spread through printed matter'. Only natural persons can be charged with a crime; thus, criminal defamation charges cannot be brought against corporate publishers (although individual journalists can be prosecuted).

While both civil and criminal defamation are problematic, a reform process of sorts is underway. In March 2000, the Criminal Code was amended, abolishing custodial sentences for insult and defamation and providing that criminal liability for insult and defamation could no longer be sought *ex officio*. This meant that public officials could no longer use the office of the State prosecutor to initiate proceedings. However, the amended law continues to provide for higher standards of protection for public officials and the maximum fine is still set at a disproportionately high level, namely 15,000 Bulgarian leva (approximately US\$7000 or 60 times an average salary).

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<sup>14</sup> See the Human Rights Watch report

The courts also play their part in the reform process, in positive as well as negative ways. Faced with a recent challenge to decriminalise defamation, the Constitutional Court rejected the notion that criminal defamation was incompatible with the right to freedom of expression. The Court also justified the more severe penalties for defamation of public persons in their conduct in office by the perceived need to protect the prestige of public institutions. In a more positive fashion, in May 2000 the Supreme Court of Cassation held that a journalist will not be liable if he or she has made a conscientious and detailed investigation and used various sources, even if the facts later turn out to be incorrect. The Court's Opinion stated: "If the necessary investigation to establish the truth of information is carried out in accordance with the established journalistic practice, the internal rules of the respective professional chamber or publishing house through the use of the objectively existing or possible sources of information, the journalist has acted in good diligence which exempts criminal or civil liability for defamation".<sup>15</sup>

A survey<sup>16</sup> of the immediate consequences of the changes to the law introduced in 2000 revealed that criminal proceedings against journalists were still being brought far more frequently than civil claims. There were far more cases brought in the regional courts than in the capital and one particular region, Vratza and Montana, accounted for 24 judicial proceedings out of the 97 cases surveyed. In this region, some defendants had multiple cases filed against them by local politicians and business people, suggesting that charges of defamation and insult were being used to silence journalists investigating cases of corruption. One explanation for this is that while larger national media organisations pick up their journalists' legal bills, journalists from the smaller regional media outlets do not enjoy such protection. Together with the fact that they are less likely to be defended by specialised media lawyers, this makes them a soft target. The survey also found that in the majority of civil cases, claimants sought high pecuniary compensation, in excess of 10,000 leva. In 25 of the 60 criminal cases surveyed, civil claims for damages accompanied the criminal complaint. Cases were shown to last for a minimum of two years and of the twenty cases concluded in the period surveyed, only one resulted in a successful prosecution. In 12 of the closed proceedings, the journalists were acquitted and 6 of the cases were closed on the grounds of default or withdrawal of the complaint.

Although the March 2000 amendments were a step forward, it is clear that further reform is needed to bring Bulgaria's law fully into line with international standards. Criminal defamation should be completely abolished, as should the provision of greater protection for politicians and public officials. The high fines for defamation are mentioned in the EU's November 2001 accession report and the high number of criminal cases that are still brought against journalists combined with the low success rate of plaintiffs indicates that Bulgarian journalists continue to be targeted by vexatious plaintiffs. While the courts appear to be upholding the rule of law and dismissing unfounded complaints, the fact that a case takes an average of at least two years to be resolved means that there is a significant period during which the threat of a crippling fine exerts a chilling effect on freedom of expression.

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<sup>15</sup> Decision No. 111, 26 May 2000.

<sup>16</sup> Carried out by the Bulgarian Helsinki Committee, available on ARTICLE 19's web site ([www.article19.org](http://www.article19.org)), on the Europe homepage, under publications.

Only a few Bulgarian defamation cases have so far reached Strasbourg and none of them have proceeded to the merits stage. In one, a lawyer complained that defamation proceedings had been initiated against him in order to exert ‘psychological pressure’; however, the European Court found that this complaint was unsubstantiated.<sup>17</sup> In another, the complainant had published “a blunt personal accusation in the absence of a reasonable factual basis whereas he could have achieved his goal to inform the public”; he received a suspended sentence for defamation but the Commission dismissed the complaint that this breached his right to freedom of expression.<sup>18</sup> Another complaint came from a different corner; the applicant complained about libellous reports in fifteen newspapers about the Macedonian minority in Bulgaria and the lack of redress under Bulgarian law. This application was dismissed on technical grounds.<sup>19</sup>

### **Montenegro**

In Montenegro, defamation continues to be a criminal offence. Article 76 of the Criminal Code provides for a fine of up to six months imprisonment for damaging the honour or reputation of a person; this is increased to up to one year in prison if the damaging information is disseminated through the media. Article 77 of the Criminal Code provides for imprisonment of up to three months for insult and again increases this term to six months if the alleged insult is disseminated via the media.

Freedom of expression is both constitutionally guaranteed and protected through the 1998 Public Information Law (the new Media Law is yet to be implemented), which guarantees freedom of expression “at the level of the standards as contained in international acts on human rights and freedoms (the UN, OESCE, European Council, European Union)”. Article 1 of this Law further provides that it shall be interpreted in compliance with the principles contained in the European Convention on Human Rights and shall be governed by the practice of the ECHR. However, the scope of this protection remains unclear. In a recent case observed by ARTICLE 19, the defendant was a politician. Since the Public Information Law relates to freedom of the press, it was argued that the defendant did not enjoy its protection.

In Montenegro, defamation law is actively used as an instrument of repression against the media. In December last year, Vladislav Asanin, the editor of the Montenegrin daily *Dan* was sentenced to three months in prison as well as a fine of 15,5000 euros. The proceedings had been initiated by Milo Djukanovic, over reports published on the Balkan tobacco mafia. The same reports had previously appeared in the Croatian newspaper *Nacional*. The judgment was affirmed on appeal.

In Montenegro, too, something of a reform process is underway. Amendments have been proposed to the Criminal Code, abolishing the crime of public insult of government institutions and removing the right of a public official to use the public prosecutor to bring criminal defamation proceedings. Whilst decriminalising defamation is not yet fully on the agenda, this is a step in the right direction.

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<sup>17</sup> *Nikolov v. Bulgaria*, Judgment of 19 September 2000 (admissibility), Application No. 38884/94.

<sup>18</sup> *Panev v. Bulgaria*, Commission Decision (admissibility) of 3 December 1997, Application No. 35125/97.

<sup>19</sup> *Stankov, Trayanov, Stoychev, United Macedonian Organisation “Ilinden”, Mechkarov and others v. Bulgaria*, Commission Decision (admissibility) of 21 October 1996, Application Nos. 29221/95, 29222/95, 29223/95, 29225/95 and 29226/95.

In contrast,<sup>20</sup> it appears that there has recently been a notable increase in the number of defamation cases brought. The Montenegro Helsinki Committee has reported that “the number of cases related to defamation in the media increased. There are some particularly interesting cases in which several ... journalists were accused and the plaintiffs are known as the promoters of hate speech, war campaign and extreme nationalism (e.g. *Mila Stula vs. Branko Vojcic* and the *Radulovic* case). Actually, it means a part of the new tendency to avoid our facing the past, war crimes etc. It is also related to the growth of extreme nationalism.”<sup>21</sup>

### **Romania**

Recent legislative events in Romania make it difficult to summarise the current state of the law.<sup>22</sup> What is clear is that defamation remains a criminal offence and that the criminal law is a favourite tool of those who wish to silence their critics. The sheer number of defamation cases is staggering. In 2001 alone, some 400 verdicts were passed under the various expression-related offences in the Criminal Code; 33 of these were against journalists who received suspended sentences.<sup>23</sup> In May this year, Associated Press reported that at that point, some 400 journalists were being sued for libel and insulting authorities.<sup>24</sup> Malicious intent is not required and therefore statements made in good faith are punished if the defendant cannot prove their truthfulness. Although prison sentences are seldom imposed, their continued existence has an intimidating effect on the journalists. It can in fact be argued that the frequent imposition of suspended prison sentences has an even greater chilling effect on freedom of expression. For these reasons, the Romanian Helsinki Committee has recommended to the Romanian Parliament that, “the liability for calumny should be shifted to the civil law, or, at least, the prison penalty should be eliminated” parallel “to introducing the malicious intent requirement in the text”.

Anecdotal evidence also demonstrates the extent to which defamation laws are abused to stifle legitimate expression. A May 2002 report by the US Helsinki Commission relates that “in December 2001, the General Prosecutor announced that he was investigating whether the singing of the Hungarian national anthem at a private meeting constituted a violation of article 236 (defamation of national symbols). That is, he used scarce taxpayer resources to consider whether people should actually be sent to prison, for up to three years, for singing.” The same report provides two other recent examples of abuse of defamation laws.

In January 2002, the General Prosecutor ordered the arrest of a journalist and a former government official on the grounds that they were suspected of circulating email messages accusing Prime Minister Nastase of corruption. These actions were portrayed by the General Prosecutor as damaging to national security and Romania’s international relations and a violation of article 168 of the Criminal Code (disseminating false news). No proceedings were initiated.

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<sup>20</sup> Or perhaps not: Montenegrin Parliament is now delaying the entry into force of the new Media Law, which would enhance protection of freedom of expression in Montenegro.

<sup>21</sup> Private communication to ARTICLE 19.

<sup>22</sup> Even the authorities sometimes get confused.

<sup>23</sup> According to information received by ARTICLE 19.

<sup>24</sup> ‘Romania pledges to abolish communist-era laws restricting free speech,’ 5 May 2002.

Then, on 3 May 2002, Romanian journalists repeated a Wall Street Journal report entitled “Among NATO Applicants, Romania Draws Particular Scrutiny”, which alleged that the continued presence of Securitate agents in Romania’s security services was a matter of concern in the context of Romania’s candidacy for NATO. In response, on 10 May, the Minister of Defence issued a warning to journalists that “life is too short, and your health has too high a price to be endangered by debating highly emotional subjects.” In addition to heightening concern that old Securitate practices, if not actual agents, were alive and well in Romania, this threat (which was issued in writing) triggered yet another row between the government and journalists. On 16 May, the Minister issued a statement saying he regretted that his 10 May statement had been misinterpreted and that it was only intended to be humorous.

Despite both the Council of Europe and the European Union identifying criminal defamation laws as a major stumbling block in Romania’s transition to a truly democratic society, little progress has been made in this direction. In 1997 the Parliamentary Assembly of the Council of Europe issued Resolution 1123 on the ‘honouring of obligations and commitments by Romania’ in which it was stated that defamation laws ‘seriously imperil the exercise of fundamental freedoms’. In the November 2001 EU report on Romania’s progress towards accession, the provisions in the Criminal Code that restrict the activities of journalists were described as ‘of particular concern’: ‘The articles dealing with slander and libel are restrictive and the extensive use of legal proceedings against journalists, in particular when they have made allegations of corruption, undermines the freedom of the press’. This report also highlighted the need for reform in other articles in the Penal Code dealing with ‘verbal outrage’ and ‘offences against the authorities’ which are at risk of being abused by the authorities in stifling public criticism.

On 23 May this year, the Romanian Government announced an Emergency Ordinance to reform the Criminal Code in order to rectify the embarrassing incident the previous week when the Romanian delegation to the Parliamentary Assembly of the Council of Europe announced that Articles 205 (insult), 206 (libel), 238 (offence against the authorities) and 239 para 1 (verbal outrage) had been removed from the Criminal Code. In fact draft amendments to the Criminal Code were passed in the Chamber of Deputies last year but they were never discussed in the Senate. The draft amendments, if adopted,<sup>25</sup> would remove the outdated crime of ‘offence against state authorities’ and imprisonment for insult, and reduce the maximum sentence for ‘calumny’<sup>26</sup> to two years (currently three), or three years if the offence involved a public servant in the exercise of his/her function (down from four years). Unfortunately, a new offence is also proposed, which would punish a threat against a public servant who holds a position involving the exercise of the State authority in their line of duty or related to acts they committed in their line of duty. It is not entirely clear what this would mean, but the maximum sentence will be four years.

I should note, finally, that Romania is one of the few countries in the region to have had its defamation laws considered before the European Court of European Rights.

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<sup>25</sup> Apparently the Chamber of Deputies and the Senate have adopted different versions and a mediation process will now be engaged.

<sup>26</sup> Defined in Article 206 of the Criminal Code as “public statement or reproach of a certain fact” which, “if true, would expose that person to criminal, administrative, or disciplinary punishment, or to public contempt”.

One case, concerning a conviction for criminal defamation in respect of which proceedings had been discontinued, resulted in a defeat for the government.<sup>27</sup> However, Romania won a recent case in which the applicant had used extremely derogatory language to criticise three teachers – the Court considered the applicant could have expressed his criticism without branding the teachers criminals.<sup>28</sup>

### *Serbia*

With the coming to power of the Democratic Opposition of Serbia (DOS) in October 2000, the situation regarding freedom of expression has improved. Many of the provisions in the repressive 1998 Public Information Law were found to be unconstitutional and the law was repealed in February 2001. In addition, charges were dropped in the controversial case against journalist Miroslav Filipovic and (some) equipment that had been confiscated from media outlets was returned. Many broadcasters who had been unable to operate consistently under Milosevic were allowed to resume broadcasting. However, despite initial enthusiasm, the overall achievements since 2000 have been disappointing. Only some of the equipment that had been confiscated under Milosevic was returned and only about a third of the 31 million dinars (US\$450,000) paid in fines by media outlets under the Public Information Act was given back, despite promises to return the full amount.

Criminal defamation laws remain in force. Article 92 of the Criminal Code, regarding libel and slander, provides for a prison sentence for anyone who “discloses or circulates any untrue material about a person, which can harm that person’s honour and reputation.” Article 93 states that “anyone who insults another” is liable to imprisonment and Article 94 provides for a prison sentence for anyone who discloses or circulates information about a person’s private life that could be harmful to the “honour and reputation” of that person. Article 96 lists a number of provisions under which individuals are exempt from punishment for expressing their opinions if there was no intention to insult, including, for example, where the context is an individual carrying out “scientific or artistic work”. Even though this Article also stipulates that there should be no punishment for individuals expressing an insulting opinion in the course of their “journalistic profession”, it does not appear that this is uniformly applied in practice. Article 98 provides for imprisonment for “anyone who publicly declares scorn for the Republic of Serbia or another republic of Federal Republic of Yugoslavia, their flag, coat of arms or anthem, or the president of the republic, the parliament and the government, the head of the parliament or the president, related to the performances of his duties”.

The (threatened) use of Serbia’s criminal defamation laws has to be seen against the wider background of attacks on and harassment of journalists. Throughout 2001, and also this year, journalists who issued critical reports have been threatened with violence. For example, after B92 broadcast a programme in April 2001 on the 1995 Srebrenica massacre, the station reportedly received numerous telephone threats, yet the government failed to denounce them or offer support to the station.<sup>29</sup> It is not only B92 that receives such threats.

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<sup>27</sup> *Dalban v. Romania*, 28 September 1999, Application No. 28114/95.

<sup>28</sup> *Constantinescu v. Romania*, 27 June 2000, Application No. 28871/95 .

<sup>29</sup> B92 has been on the receiving end of numerous threats.



On 23 April 2002 it was reported that Vojkan Ristic, Vranje, correspondent for the Belgrade daily *Danas* and *Beta News Agency*, had received a series of telephone threats in the afternoon of 22 April. This was allegedly due to an article published in *Danas* entitled “Simpo paid 10 million without proof of receipt of goods”. Allegedly the threat was: “Don’t hide behind the initials R.D., you’ll end up in a plastic bag”. In another incident, in June 2001, Milosevic supporters allegedly attacked and beat three journalists – Milos Petrovic, of *Sudio B Television*, Suzana Rafailovic of *Beta New Agency* and Petar Pavlovic of *Fonet*.

Public officials as well as government departments frequently resort to defamation laws to stifle criticism. On 12 May 2002, the Serbian Road Directorate announced that it would file criminal charges against *Blic News* for an article, “Surcin Boys Build Roads Through Serbia” on the construction and restoration of highways and tenders issued by the Serbian Road Administration.<sup>30</sup> The article alleged that the job of building the Blegrade-Nis highway had been assigned without allowing for fair competition. The author of the article refuted the information, reportedly further to pressure from the Road Directorate.<sup>31</sup> In June 2002 it was reported that journalists from the Kragujevac weekly *Nezavisna Svetlost* were regularly being sued for libel by prominent local individuals and had had to appear in court twenty times in February 2002.<sup>32</sup> Also in June, the Minister for Agriculture, Dragan Veselinov, sued Novi Sad daily *Gradjanski List* for 1.5 million dinars (about 250,000 Euros), claiming emotional suffering and damage to his reputation.

The offending article in the daily claimed that Veselinov had abused his official position by poaching in Serbian hunting grounds.<sup>33</sup> As a result of the constant threat of proceedings, the Independent Association of Serbian Journalists recently held a protest against the high number of legal proceedings initiated against journalists in Southern Serbia.<sup>34</sup>

At the moment, some 300 new cases are going through the courts, with many of the reporters being sued by the former regime’s associates as well as by members of the ruling coalition.<sup>35</sup> Most recently, an official in Djindjic’s Democratic Party, Radoslav Ljubisavljevic, charged B92 with libel after the station reported that he had been handed a two-year suspended sentence in 1994 for forgery and abuse of power. Ljubisavljevic did not dispute the report’s facts but sued B92 for ‘mental anguish’. “What really hurts Ljubisavljevic is the truth”, the Association of Independent Electronic Media commented.

## 8. Common trends and conclusions

The first and foremost conclusion is that criminal defamation laws are still in existence across the region and, worse, that they are in active use. In many countries this situation is exacerbated by the fact that public officials and even State institutions enjoy enhanced protection under the criminal law and may resort to the heavy arm of

<sup>30</sup> ANEM Weekly update, May 11-17, [www.medienhilfe.ch/Monitor/SER/ANEM/0502.htm](http://www.medienhilfe.ch/Monitor/SER/ANEM/0502.htm).

<sup>31</sup> *Ibid.*

<sup>32</sup> ANEM, 1-7 June.

<sup>33</sup> ANEM – 27 June 2002.

<sup>34</sup> ANEM, Weekly Update, May 18-23.

<sup>35</sup> Research by ARTICLE 19.

the State prosecutors to litigate cases on their behalf. Combining the two ‘evils’ of criminal defamation and added protection for public officials, this makes for a hostile environment for freedom of expression. It goes without saying that the mere existence of these laws acts to inhibit seriously the right to freedom of expression, particularly given the possibility of harsh sanctions. Even where these are rarely applied, the problem remains, since the severe nature of these sanctions means they cast a long shadow.

Another worry is that in some countries in the region, (criminal) defamation laws are used as a form of harassment. Rich and powerful plaintiffs bring or threaten to bring cases simply to bully journalists, or to litigate them into bankruptcy. Such cases may drag on for a prolonged length of time, a year or more, before being withdrawn or dismissed. Even if no verdict is recorded, the near-constant involvement in legal proceedings for some defendants makes it impossible for all but the largest media concerns to engage in the kind of critical and investigative reporting that is necessary in a democratic society. This could be seen as evidence of a lingering culture of intolerance towards criticism within some of the countries and the lack of acceptance of a vigorous press. The apparent lack of recognition of the defence of ‘reasonable publication’ in many of the countries surveyed and the twin-track use of civil and criminal defamation laws is another symptom of this.

While many of the countries in this region have engaged in a process of reform, these are proceeding at a very slow pace and usually fail to address all of even the more serious problems. Some official pressures – notably the EU dialogue, but also the constant CoE monitoring – do have a positive effect, but the extent to which countries are truly working towards decriminalisation of defamation is unclear. In this regard, it does not help that criminal defamation laws remain on the statute books of many of the EU Member States and that the European Court of Human Rights has so far not taken a principled stance on this issue. Really positive developments can be counted on the fingers of one hand and, in the last six months or so, the reform process in some countries has now stalled altogether. This means that the present conference probably comes at an opportune moment: it is time to breathe some new life into the reform of defamation laws in the region.

## VI. Speech by Mrs Vesna Alaburic, Attorney-at-Law, Croatia

### 1. General legal framework

In Croatia freedom of expression is one of the basic constitutional rights and freedoms. Namely, the Constitution of the Republic of Croatia passed in 1990, in Article 38 Paragraph 1, guarantees freedom of opinion and expression of thoughts. The freedom of the expression of thoughts, as set out by Paragraph 2 of the same Article, includes in particular the freedom of the press and other public media, freedom of speech and public appearance as well as the freedom to found any institution of public information.

The Constitution also, in Article 38, Par. 1, expressly bans censorship and guarantees journalists the right to freedom of reporting and access to information, and in Par. 4 of the same Article guarantees the right to correction to anyone whose constitutional right has been breached by a public information.

The constitutional right to the freedom of expression is, however, not unlimited. Article 16, Par. 1 of the Constitution allows the limitation of constitutional rights and freedoms (inclusive the right to the freedom of expression), but under the provision that the limitation is set out by law, exclusively for the protection of taxatively listed legitimate personal and social values/interests: *the freedom and rights of other people, the legal system and public morality and health*. Paragraph 2 of Article 16 also sets out that any breach of a human right or freedom must be *proportional* to the nature of the need for certain limitation on a case to case basis.

If we compare Article 38 of the Constitution with Article 19 of the Universal Declaration on Human Rights, Article 19 of the International Pact on Civil and Political Rights, and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, it can be asserted that, at the constitutional level, freedom of expression in Croatia is guaranteed in accordance with the abovementioned international documents.

We must, however, point out that the Constitution fails to expressly state and guarantee one of the basic elements of the freedom of expression in a democratic society – the right of the public to *receive* all information of justified public interest („the public’s right to know”). This is unlike all relevant international documents on human rights and freedoms, which expressly establish not only the right of every person to spread information and ideas, but also the right to receive information and ideas of public interest which others wish to convey to them.

However, this omission in the Croatian constitution should not result in undesired consequences, since courts and other state institutions will have to deal with the aforementioned right by directly applying international conventions on human rights and freedoms which Croatia has ratified, as well as Croatian laws (e.g. the Law on Public Information), which expressly guarantee that right.

The Croatian constitution in its Article 134 stipulates that all international agreements made and ratified in accordance with the Constitution and subsequently published, constitute a part of the interior legal system, and in their *legal power they are above the law*. The provisions of such agreements can be altered or nullified only under the conditions and in the manner stipulated in them, or according to the general rules of international law.

Thus the European Convention for the Protection of Human Rights and Fundamental Freedoms (which Croatia ratified in October 1997), as well as other international agreements guaranteeing freedom of expression, after their ratification in the Croatian Parliament, became part of the Croatian legal system, above the law in its legal power. In other words, they have a higher legal status than other („ordinary”) laws, and if some stipulations of domestic laws are not in accordance with the ratified conventions, domestic courts are required to directly implement the provisions of the conventions.

This includes, of course, adhering to the established practice of international supervisory bodies authorized for interpretation and implementation of the conventions – especially, to the case law of the European Court of Human Rights.

This constitutional and legal status of international agreements should represent a significant additional guarantee that freedom of expression will be protected in Croatia as much as in other modern democratic societies.

## **2. Defamation of public figures**

It is indisputable that the reputation and honour are important personal goods for every man, which also have serious social implications. Therefore, the contemporary legal systems protect them with good reason from an unjustified and ungrounded attack with a spoken or written word. The explicit or implicit protection of everyone’s reputation and honour is guaranteed also by international conventions and declarations, as well as constitutions of contemporary democratic countries. The protection of the reputation and honour (comprised by a syntagm “protection of reputation and rights of others”) is, namely, one of legitimate reasons for the possible legal limitation of the freedom of expression.

However, those limitations have their limits as well, because in contemporary democratic countries, of course under certain assumptions and in certain circumstances, the right of citizens, especially journalists, to impart information (facts) and ideas (opinions) of legitimate public interest, as well as the right of the public to receive them, are protected as a right and freedom of a more fundamental significance.

### *Criminal-law and civil-law protection of reputation*

In Article 35, the Constitution of the Republic of Croatia explicitly guarantees to every man and citizen the respect and legal protection of their personal and family life (i.e. the privacy), dignity, reputation and honour.

The violation of those personal goods is penalised both as a *criminal offence* and as a *civil-law injury (tort)*. In other words, every person, whose reputation has been violated by a piece of public information, can bring a *private criminal law suit*, pursuant to the Criminal Law, against the author of that information, because of the alleged defamation (libel or insult), or/and a *civil law suit*, pursuant to the Law on Public Information, against the newspaper publisher who published defamatory information, for the purpose of receiving a compensation for the non-material or/and material damage due to the suffered mental anguish (emotional distress) and fear caused by violation of the reputation. In that respect, all citizens are, in principle, equal before the law.

It is important to point out that the private *criminal law suit* for alleged violation of reputation can be brought against the author of the defamatory information not only by natural persons (individuals), but also by legal persons (business enterprises, trade unions, political parties, various citizens' associations), even by the bodies which have not the status of legal persons (the so-called *ius standi in iudicio*), like the Government or Ministries.

However, in *civil* cases, the financial compensation for a *non-material* damages can be awarded only to the natural persons, and not to legal persons. Namely, in Croatian legal system the compensation of damages has a character of a just satisfaction/compensation to an individual due to the actually suffered mental anguish (emotional distress) and fear caused by violation of the reputation, whereas the legal entities, per definitionem, cannot suffer mental anguish and fear that would justify the awarding of such satisfaction.

Legal persons can be awarded, under certain legal assumptions, only a compensation for an actually suffered and established *material* damages caused by some published information (which is extremely difficult to prove, therefore such suits are very rare and, as a rule, unsuccessful).

Pursuant to the Law on Public Information, a civil law suit for material and non-material damages can be brought only against the publisher of the newspaper (media) that published the information at issue (which, as a rule, is a legal entity – a company), and not directly against the author (journalist or editor) of the published information. On the other hand, according the Law, the publisher who pursuant to the court judgment paid a compensation for damages can request from the author of the information a return of the paid amount, provided that the publisher proves that the author caused the damage intentionally or by a gross negligence (so far, no such case has ever been registered).

#### *Defenses available to the defendants in civil and criminal defamation cases*

As far as the defenses available to defendants in defamation cases are concerned, the Criminal Law and the Law on Public Information, surprisingly, establish considerably different premises for absolving from liability and contain entirely different legal standards of proof.

In Article 23, the Law on Public Information taxatively states the following presumptions for absolving the media publishers from the liability for damages:

- if the information at issue is a correct report from a debate on a meeting of a government body, or from a public gathering (assembly), or if it has been transmitted from a document obtained from the government body, and its meaning has not been changed by the editor's interpretation (headline, superscript headline, subheading, etc.);
- if the information at issue has been released in an authorised interview (unless the interview contains *obvious* libel and/or insult);
- if the information is based on true facts;
- if the (untrue) information is based on facts, which the author had a legitimate reason to believe were true, provided that the author undertook all necessary measures to check them, and that there was a legitimate public interest for that information to be published, as well as that the author acted in good faith;
- if the information at issue refers to value judgements of the author, the publishing of which was in the public interest, and if the information has been given in good faith;
- if one is talking about the photograph of the injured party taken in public place or with the injured party's knowledge and consent for publishing the photograph, and the injured party has not disallowed the photograph to be published, i.e. limited the right of author of that photograph to exploitation of the work;

It follows that the truth of some *factual* statement is an absolute defense for the publishers in civil proceedings for damages.

On the other hand, in criminal proceedings, the truth of the information (statement of fact) represents unfortunately no defense for the defendant. Because, if the defendant proves that the information is true he, admittedly, cannot be found guilty for libel, but still can be found guilty for an insult.

According to Article 203 of the Criminal Law, the defendant in criminal defamation proceedings (for libel or/and insult) can be acquitted of all charges only if the defamatory statement is contained in a scientific, literary, artistic work or public information, i.e. if it has been disclosed during the performance of an official duty, political or other public or social activity, in the journalist profession or in the defence of certain right or protection of legitimate interests, provided that *it clearly follows from the way of expression and other circumstances that the author of the information did not intend to harm the honour or reputation of the plaintiff*.

Consequently, quite contrary to the Law on Public Information and, by the way, the case law of the European Court for Human Rights, the Criminal Law does not consider the truth or untruth of some factual information apt/able to harm someone's reputation as essential for a defendant's successful defense.

In both cases, the defendant will be acquitted of *all* charges (for the libel and for the insult) only if it is proved that it clearly follows from the way of expression and other circumstances that he had no intention of harming plaintiff's reputation. Such legal solution has paradoxical consequences: on the one hand it makes the defense of the defendant more difficult in case of presenting and spreading the truth in a *rough* way, but at the same time makes the defence *easier* in case of presenting and spreading the untruth in a *tactful* way. Namely, *one who presents the truth can be found guilty* for an criminal offence (insult), if it does not follows clearly enough from the way of expression and other circumstances that his aim was not to harm the reputation and honour of the plaintiff, whereas *one who presents the untruth can be acquitted of all charges* if it clearly follows from the way of expression and other circumstances that he did not aim at harming the reputation and honour of the plaintiff!

Because of such contradictory legal solutions regulating the same legal matter (protection of reputation), Croatia is one of the few countries, in which the publisher, pursuant to the Law on Public Information, can be absolved from the civil responsibility for damages in case of publishing the *true* information (fact), whereas its author, pursuant to the Criminal Law, can still be found guilty (and even sentenced to prison) because of the same (true) information.

#### *Value judgements/opinions*

A similar situation exists as far as value judgements (i.e. opinions, ideas, comments) are concerned.

In the Croatian court practice (as well as in the court practice of other democratic countries) it is indisputable that value judgements (opinions), per definitionem, are not subject to proof, and that only the truth of factual statements can be proved, or the truth of the factual substratum, which was the basis for expressing a certain value judgement able to violate one's reputation. In other words, the truth of factual basis (in its essential elements, of course) of certain value judgement can be proved, but not the truth of the opinion/judgment expressed.

Although the expression of critical value judgements suitable to violate one's reputation or honour enjoys a higher degree of legal protection than the expression of inauthentic factual statements, it does not mean that value judgements (opinions, comments) enjoy the absolute protection. By expressing value judgement, one can, pursuant to Croatian laws, commit a criminal *offence (of insult)* or/and a civil-law delict of *violation of dignity, reputation and honour*.

However, the possibilities of defence available to defendants in the criminal and in the civil proceedings are entirely different.

The Law on Public Information adopted the principle that the journalist is entitled to express even the objectively offensive value judgements (opinions), especially about government officials and other public persons, provided that the value judgements at issue have been expressed in the public interest and that one is talking about a fair comment, based on a certain factual basis, i.e. that one is not talking about a malicious attack without any factual basis.

Namely, the Law on Public Information explicitly states that the publisher will not be liable for the damages, i.e. for the violation of reputation done by the published information, if the information at issue represents the value judgement of the author, published in the public interest and in good faith.

On the other hand, the Criminal Law doesn't recognize the public interest, or good faith, or fair comment, or honest belief as the possible defenses in cases of insult made by the expressed opinion/value judgement. The defendant will be acquitted of the offence charged only *if it clearly follows from the way of expression and other circumstances that the author had no intention to violate the reputation of the plaintiff* (i.e. to insult him). Just as in the case of libel made by the statement of fact.

Finally, it can be concluded that, as opposed to the quite liberal Law on Public Information, the provisions of the Criminal Law referring to the protection of reputation and honour are restrictive and in complete disharmony with the principles of the contemporary criminal jurisprudence. Therefore, they should be amended as anachronous and highly inappropriate for the democratic society.

#### *The status of public and private persons*

The Croatian legislature on protection of the reputation does not, in principle, distinguish between politicians or other public figures and private persons, whether from the civil or criminal point of view. With regard to protection of reputation, everyone is equal before the law. It relates to the ways of initialisation of the court proceedings (criminal or civil – by private law suits), as well as to the legal standards applied and to the burden of proof imposed.

However, it is necessary to mention that in the period between 1992 and 2000 five of the highest state officials (the President of the Republic, the President of the Parliament, the Prime Minister and the presiding judges of the Constitutional Court and the Supreme Court) were in a rather privileged position when the criminal-law protection of their reputation was at issue. Namely, whereas the ordinary citizens (and all other legal persons as well) initialised the criminal proceedings in defamation cases by bringing the *private criminal law suits*, in cases of defamation of any of the above mentioned highest government officials regarding their work and position, the state attorney was entitled to undertake the criminal prosecution *ex officio*, at the written request of the allegedly defamed official (in the period between 1992 and 1996), and with the prior written consent of the official (in the period between 1996 and 2000).

However, in May 2000, the Constitutional Court declared the Criminal Law provision at issue unconstitutional (i.e. contrary to the constitutional principle of equality of all men, regardless of their social position or status), and annulled it.

Although in formal legal terms all citizens are equal when the protection of their reputation is at stake, it is generally accepted premise in the Croatian court practice, both civil and criminal, that public persons, especially state officials and politicians, have to tolerate a higher degree of public criticism than the private persons do.



The term public persons include not only politicians and state officials, but also actors, singers, famous sportsmen, businessmen and other persons who are well known/famous to the general community.

*The court practice in criminal and civil defamation proceedings*

More than 300 criminal proceedings against journalists for libel or/and insult have been initialised before Croatian courts in the last ten years, as well as more than 700 civil proceedings against newspaper publishers for recovery of damages.

Consequently, as opposed to the majority of democratic countries in which civil law suits (in addition to requests for publishing the corrections and replies) are the most frequent or even exclusive way of reacting to the violation of reputation, and resorting to the *criminal law suits* is relatively rare (especially when the public persons are concerned), the situation in Croatia is significantly different in that respect. Along with the initialising the court proceedings for damages against newspaper publishers for the alleged violation of reputation and the emotional pain and fear suffered, the injured parties often bring criminal law suits against the authors of information, i.e. journalists and editors, as well.

Due to the fact that Croatian courts are chronically overburdened with cases, those proceedings are relatively slow (they usually last 5 or more years till the final judgment). The court practice is far from being established and it is still very uncertain and controversial. Although several dozens of final court judgments have already been passed, it should be pointed out that, by now, the Supreme Court has solved only a few appeals concerning freedom of expression and freedom of the press, that the Constitutional Court considered only couple of such cases, and that the European Court of Human Rights did not have a chance to consider any application from Croatia, pursuant to Article 10 of the European Convention for Protection of Human Rights and Fundamental Freedoms. Only the judgments of those highest court instances will become specific precedents relevant for the future Croatian court practice in this field.

In spite of that, on the basis of the court practice so far (both in criminal and civil cases), two rather paradoxical conclusions suggest themselves.

Firstly, although the Law on Public Information is undoubtedly one of the most liberal laws of that kind in Europe, the court practice in that respect is more restrictive than in the most of European countries having longer democratic tradition. The frequency of awarding, for our economic circumstances, relatively high damages against publishers has significant chilling effects on the freedom of expression in Croatia.

And secondly, although the provisions of the Criminal Law regulating the criminal liability for defamation are among the most rigid in Europe, the Croatian courts applied them cautiously. By now not one journalist has been duly sentenced to prison. Very small number has received suspended prison sentences or has been fined. In fact, most of the criminal proceedings against journalists were discontinued because the limitation period had run out (after four years from the date of publishing information).

In the previous ten years, the media and journalist have been mostly sued by the so-called public persons – usually the former government officials, members of the Government, politicians and the prominent members of the Croatian Democratic Party (HDZ) (the ruling party in the period between 1990 and 2000), and members of their families, as well as businessmen in friendly relations with the former ruling establishment. In short, there is almost no prominent member of the former ruling party (HDZ) that has not initialised criminal proceedings against a journalist or editor and/or civil proceedings against the publisher. Many of those cases are still pending. There were cases in which the criminal suits were brought against journalists and editors for an alleged defamation even by the President of the state (i.e. by the state attorney on his behalf), as well as by the Ministers in the Government, the ruling party and certain Ministries.

In this context, it is enough to mention only two criminal procedures, which formerly received a great attention of the domestic and international public: initialisation of the criminal procedure *ex officio* by the state attorney's office against the editor and the journalist of "Feral Tribune", Viktor Ivančić and Marinko Čulić, because of the alleged libel and insult of the President of the Republic (in May 1996), and a private criminal law suit brought by the Prime Minister and 23 Ministers in the Government against the editor in chief of "Globus", Davor Butković, also because of an alleged defamation (in October 1997). The results of both proceedings were devastating for the plaintiffs.

It is also important to point out that the great majority of defamation law suits were brought against editors and journalists of four independent newspapers that were very critical towards the former Government: *Globus*, *Feral Tribune*, *Nacional* and *Novi list*. Therefore, it can be reasonably concluded that it was the way in which the former ruling establishment actually exerted illegitimate financial and psychological pressure on the critical media.

Although none of the journalists (or anyone else) has ever been sentenced to prison for the expressed idea/opinion or information, one should by no means underestimate the chilling effects of those criminal proceedings on the freedom of expression. It is especially true for the awarded suspended prison sentences (which will not be effected, unless the sentenced person is once again sentenced for a criminal offence during the time determined in the judgment).

However, the greatest chilling effects on the freedom of expression of journalists and on the freedom of the press in general are produced by civil proceedings against newspaper publishers for damages due to the violation of reputation. Although the Law on Public Information regulates, primarily, the publishing of the correction, reply and public apology as the ways of compensating the damages, and the payment of a financial/pecuniary satisfaction only if the intensity and duration of the mental anguish (emotional distress) and fear caused by the violation of reputation really justify it, almost all plaintiffs request precisely the financial compensation. In more than 700 civil proceedings for damages the plaintiffs requested from the publishers the total exceeding 20.000.000 EUR. Single claims range from 3.000 to several hundreds of thousands of EUR, and the average awarded compensation ranges from 2.000 to 10.000 EUR (the stated amount does not contain the interests, court fees and defence costs).

Those court proceedings impose a heavy financial burden on the newspaper publishers, especially the smaller ones, and severely endanger even their existence. The bankruptcies of some publishers confirm that as well.

## VII. Speech by Mr Gojmir Bervar, Radio Slovenija

In March of this year, top model Naomi Campbell won her lawsuit against the London-based *Mirror* tabloid, filed after *Mirror* had published a photograph of Campbell coming out of a Narcotics Anonymous meeting. The model had denied allegations of drug addiction, made by media during previous months, and also denied being an addict during court proceedings regarding her lawsuit against *Mirror*. Despite all evidence to the contrary, the court ruled in her favour.

It is significant to note that the model hadn't sued the newspaper on the grounds of denial of drug-taking, but rather presented the lawsuit as being about protection of the right to privacy and confidentiality.

The court's ruling in favour of Naomi Campbell sent an important message to the sphere of people whose livelihoods depend on the public. Should you get caught doing something less than admirable, do not sue the media for defamation. Try to force a favourable outcome by utilizing the detour we call the right to privacy.

Most ethics codes of press councils and other self-regulatory bodies distinguish the right to privacy of persons whose livelihoods depend on the public from that of persons who appear in the public eye after having suffered some sort of misfortune (or experienced something particularly fortunate) and are otherwise not accustomed to it. According to most of these codes, people who benefit from entering the public arena have to accept that, to a large extent, their private lives have also become public. They, i.e. these lives, can not be made available to the public solely at the express desire (and in favour) of actors, models, athletes or politicians, but become predominantly public, provided their owners are not able, or even willing, to sufficiently protect them. As an example of how even a public figure can protect their private life, let me mention the private life of **Milan Kučan**, the current president of Slovenia, whereby every attempt at penetrating the man's private home has failed within days. On the other hand, the President never used his private circle for public promotion.

Lives of public figures are not entirely their own, whether they like it or not. Regarding the Campbell case, one can surely consider the negative influence the top model's illegal drug use has had on her admirers. The Prime Minister's family life, his health or his mental problems concern our lives. We therefore have a right to be informed of these things. And that is not belabouring the fact that people executing a public function are prone to misuse the position any such function entails.

Even excluding the message the London court has sent in »the Campbell case«, the dilemma concerning the protection of the right to privacy is one of the main areas wherein lawsuits against defamation filed by public personalities, recently accustomed to their new positions, in transition countries as well as countries of developed democracy, take place.

Yet there exists an essential difference. While full-fledged democracies have, helped by rapid technological progress (which, in turn, also works to the advantage of tabloid press), attempted to protect the privacy of the home, regardless of the background of injured parties, the right to privacy in many transition countries has been perverted into protecting the privileged classes from the media.

National courts have simply adapted the legislature, formerly designed to protect heads of ruling parties, to suit demands dictated from the outside by people interested in protecting their own privacy. In many transition countries, numerous legitimate articles proving nepotist conduct in public affairs by heads of state and their nearest have resulted in court proceedings, courts awarding massive sums in damages – not to punish newspapers for having published untruthful claims, but because reporters had invaded the privacy of the plaintiffs.

In many of these countries we have basically witnessed the multiplication of »the Campbell case«, as reporters and media have not been sued for wrongful use of information, i.e. defamation, but for having interfered with the privacy of heads of state and their respective parties. As usual, a valid concept, meant to protect people not used to the public eye against the aggression of media intruding upon their private lives in search of profit, has been used to protect those already in possession of power, money and influence. It is the latter who continually refer to those who will never take advantage of their right to protection of privacy, having neither the knowledge, the money, nor the power to do it. Examples of this abound: Croatia under Tudjman, Serbia under Milošević and – I've been informed of this during this year's visit to the country – Azerbaijan under Aliyev. The basic idea was, or in certain places still is, to exhaust independent media with lawsuits until they fold on their own.

But the Campbell case and others like it in fully developed democracies indicate that politicians and show-business people have quickly caught on to the courts' new sensibility towards privacy. Our Irish colleagues are facing a number of unreasonable compensation demands for alleged cases of defamation, mostly from politicians.

The policy established by the London court in the Campbell case may have a myriad of unforeseen effects on the freedom of public speech. These effects may prove even worse in transition countries, as politicians will now have a decision of a court in an undisputedly ordered and democratic country to quote when they decide to settle scores with media.

In March of 1998, Slovene weekly *Mladina* published its first article regarding illegal financing of the Slovene People's Party electoral campaign. Two months later, the party president, at the time also the vice-president of Slovene government, Marjan Podobnik, the person responsible for the financing, filed a lawsuit against the weekly. The matter appeared all the more unpleasant when one took into account Marjan Podobnik's campaign strategy – it relied on a story of honesty and legality, combined with guarantees that the party, should they be voted into office, would insure a morally spotless functioning of the government. It had been these promises that got the Slovene People's Party voted in second and delivered it a place in the government. But now voters could pick up a magazine and read an article including copies of transfer orders, thus proving the party and its president had swindled the law. The plaintiff and his attorney – not unlike the Campbell case – decided not to base the lawsuit on *Mladina's* allegedly defamatory claims of illegal campaigning – existence of written proof made these claims difficult to contest – but to concentrate on one particular issue: had the president of the Slovene People's Party met with Metod Dragonja, director general of Lek pharmaceutical company, or not, and had the meeting included the president giving the director general any promises.

This was where *Mladina* scarcely had any ground to stand on: sources assured it the meeting had taken place, yet, naturally, it wasn't possible to expect an honest account of a meeting that had led to illegal conduct from the two people involved.

The trick, for which most other media would fall, depended largely on the outcome of the trial. If the court found the meeting hadn't taken place, a superficial reader would assume Marjan Podobnik had won completely – that illegal campaign financing hadn't taken place either. In this aspect, the tactic came close to being completely successful.

The ruling, which at first glance favoured the plaintiff, was interpreted thus (albeit only by superficial readers): the court finds no evidence of illegal financing. BUT THIS WAS NOT THE CASE AT ALL! Court found the financing had been irregular, but the main point it had to decide was: had the meeting between Podobnik and the director general of Lek taken place. Claims of this, the court ruled, had not been sufficiently substantiated by evidence. It took consideration at higher judiciary levels to find the claims of the *Mladina* weekly had not been offensive, but eventually the plaintiff lost.

Journalistic research is neither police work nor prosecutorial work. The minimum requirement for disclosure of an alleged impropriety is either a written document, backed by at least one source, or at least two information sources corroborating the same story. When researching a particularly explosive story, any professional journalist will make sure to find more information sources – and focus on sources which can be relied on to confirm their statements in the event of a lawsuit (unwillingness of sources to testify in courts is one of the main problems of investigative journalism). But the conclusion of journalistic research is still hardly comparable to a police investigation or the amount of materials a prosecutor would have to prepare before going to trial. If journalists worked that way, the majority of strongly resonant political scandals would still be unexplained, Watergate would be little more than a fairy-tale, whereas jurisdictional organs and police would be uncovering a mere half of the cases they do when backed by the crude proof-acquiring procedures journalists use to get their stories. Yet such is the function of media – they are not courts (although some strive to be), they are not police, but they are not the popular voice either. In principle, they have to tackle issues prosecutorial organs do not or will not – they have to follow up on things voiced by the people and on rumors to try to uncover what lies beneath. I realize many of them slip up when attempting to do this. »Exclusive information«, offered by some sources to incriminate other people, often prove a tad too tempting to spark genuine interest in a journalist. But even in cases where media do not conduct the proof-acquiring procedure to its entirety, they are a welcome contributor to the mental health of society as well as its judiciary system. When a matter is opened by one media member, this causes others to get involved, creating an investigative apparatus unattainable even to a well-equipped police force. The credibility of every single contribution may not be impeccable, but it offers police and prosecutorial bodies enough to launch a »professional« investigation. That is why in most democratic judiciary systems journalistic mistakes are looked upon forgivingly. Journalists' actions are judged by whether or not malicious intent had existed, whether or not they acted in good faith as to the sincerity of their informants, and whether or not acquired information truly led to the conclusions they have drawn.

Of course, the problem of media treatment of public personalities in transition countries needs to be viewed through history of the media in former socialist countries. And even within this context there are important nuances. In countries of the so-called socialist camp, the transition from a totalitarian system to a system of media freedom transpired basically overnight. Czech Republic, Slovakia, Hungary, Poland and other countries have switched from a time when no one, apart from the politically problematic, was criticized, to a time of publicly assigning responsibility using full names, in the matter of months. (In some countries this was accompanied by a newly shaped pressure, claiming that since the new democratic forces were media's allies in overthrowing the old regime, media shouldn't inflate slip-ups of the new government and its officials.) But Slovenia and, partly, other former Yugoslav republics have by the end of the 1980's developed almost unlimited media freedom. Courts were left empty-handed by the explosion of pluralism and, having no previous experience to draw from, even allowed writing, which went beyond limits of ethical propriety.

Meanwhile, those branded by media were mentally still living in a system where there had been no question of the ability of politics to interfere with judiciary systems. Civil actions pertaining good name and honour were rare, since such matters were customarily settled outside courts, through party channels. In Slovenia this period of lawlessness before the collapse of one-party systems (also precipitated by other political circumstances) lasted almost half a decade. After the democratic turnover had been completed, politicians and other public personalities quickly adapted to the slow-forming judiciary practices. They swamped the courts with civil suits against the media.

After a few years of adaptation to new social conditions the proliferation of civil suits against journalists and media slowly modified the Slovene judicial practices. Luckily, we have seen increasing consideration of the specific nature of journalistic work and respect for professional ethics. Also, courts have quickly recognized the distinction between treatment of public personalities and treatment of individuals who only find themselves in the public eye once in their lifetimes. The formation of new judicial practices is apparent in the fact that not even 5% of lawsuits against media and journalists end in convictions. Courts, trapped in the collision of separate constitutional principles – the right to privacy and the right to being informed – repeatedly decide in favour of the public's right to be informed of public affairs and actions of public personalities. On their way to creating new standards, courts had to solve several problems attributable to their lack of experience. A typical case of this has been the conviction of a daily *Večer* journalist for her verbatim quotation of a statement regarding one of the members of the presiding court by a non-parliamentary party politician. It is an undisputed fact that present Slovene judicial practices exhibit positive signs of consistency in press-related lawsuits. Will »the Campbell case« compromise the experience gained thus far?

## **VIII. Speech by Mr Gent Ibrahimi, Director, Institute for Policy & Legal Studies of Tirana**

### **1. Defamation Constitutional Framework**

- In Albania, like most civil law countries, libel is predominantly a criminal offence. Private law suits for damages, although possible, are relatively unusual. At a formal level, it is arguable that interests of freedom of speech are rated higher in Albanian domestic law compared with the right to reputation. The Albanian Constitution grants express protection to freedom of speech alone (articles 22 and 23). On the other hand, the right to reputation is arguably a well-established right throughout Albanian legal history (it was established under Roman law already). It is duly awarded protection under the criminal and civil codes of the Republic of Albania.

The higher position of the norm protecting freedom of speech is no accident. It reveals the Albanian constitutional doctrine, according to which, unlike most personal rights (including the right to reputation) which seek to shelter the individual from arbitrariness coming from the state or other individuals, the freedom of speech is a fundamental human right that is essential both to the self fulfilment of the individual and the effective functioning of a democratic society.

Such doctrinal choice was determined by Albania's recent history of totalitarianism, the liberal interpretation of the free speech principle by the European Court of Human Rights and the populist perception, which quite often in transition makes its way to become official policy, that depicts the right to reputation as a manifestation of selfishness rather than a real good for the society at large.

The above mentioned hierarchy of norms does not mean however that the Albanian Constitution grants absolute protection to freedom of speech. Article 17 of our constitution mandates in a general fashion (intending all the rights therein) that rights, including freedom of expression, can be restricted "by law, in the public interest or for the protection of the rights of others". However, such restrictions must be "in proportion to the situation that has dictated them" and "in no case may exceed the limitations provided for in the European Convention of Human Rights".

May I draw your attention to the "European Convention Clause". The just cited provision of the Albanian Constitution effectively makes the ECHR an integral part of the Albanian domestic legal system. Additionally, according to the formula of article 122 of the same constitution, the ECHR is to prevail over ordinary Albanian laws in case of conflict\*. In other words, Albanian judges must apply the provisions of the ECHR as well as look at the jurisprudence of the Court as a set of precedents.

Were we to stop here with our analysis, we could have reached the wrong conclusion that in the context of Albania, the outcome of the clash between those two conflicting private rights (freedom of speech and right to reputation) is predetermined at the expense of the latter.

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\* Constitution, article 122 "1. Any ratified international agreement constitutes part of the internal legal system after it is published in the Official Journal of the Republic of Albania. It is directly applicable, except when it is not self-executing and its application requires the adoption of a law ..... 2. An international agreement ratified by law has priority over the laws of the country that are incompatible with it."



In reality, Courts do not seem aware of the present state of affairs and tend to overlook the freedom of speech implications in the course of individual libel actions. The High Court of Albania has failed (even though it has had several chances), so far, to provide the lower courts with sufficient guidelines on how to handle such cases.

On the other hand the potential of the Albanian Constitutional Court with regard to freedom of expression is limited. According to the Constitution of Albania individuals can file a complaint directly with the Constitutional Court only for alleged violations of due process rights. In other words only an allegation for the violation of procedural rights would be given standing by the Constitutional Court of Albania. A substantive right like the freedom of expression or the right to reputation could only receive the Court's attention if in the course of a normal judicial proceeding, the court establishes that a certain statute is inconsistent with the constitutional right to free speech. In that case the proceeding may be suspended and the case referred to the Constitutional Court for Review.

Ultimately, upon exhaustion of domestic remedies, individuals can take the Republic of Albania to the European Court of Human Rights for violation of the rights envisaged by ECHR. This last resort, however, has not been availed by Albanian individuals until now as the Court has yet to take the first Albanian case.

## 2. Defamation Law

- Reconciling journalistic freedom with the right to individual reputation has proved a major challenge for the Albanian domestic legal system and the work of our courts. The Albanian society, perhaps even more than other societies in Europe, needs its public (mostly through the media) to actively perform their "watch dog" role. Constructive public criticism, exposure of corruption and government inefficiency are but some of the many desired effects of free media. On the other hand, the right to individual reputation stays at the core of democratic societies. This is why defamation law continues to exist in Albania in order to prevent abusing freedom of speech at the expense of the reputation of individuals. Defamation legislation is present in the Republic of Albania both in its criminal and civil form.

Criminal Defamation – As I had a chance to mention at the beginning of my presentation, in the context of Albania, criminal law constitutes the primary means for injured parties to obtain redress in cases of unwarranted attacks on the reputation of individuals. On the other hand, Albanian criminal law concerning defamation is fair in its scope as it aims to protect individual reputation in the first place.

The *travaux préparatoires* for the preparation of the Criminal Code clearly indicate that the intent of the legislator was to provide protection to the reputation of individuals rather than to other, non-personal interests. Articles 119 and 120 of the Criminal Code materialise the concept of the legislator that reputation is strictly linked to a physical person and may not be commonly applied to juridical persons and even less to objects.

Albanian Criminal Defamation Law consists of 5 articles of the Criminal Code<sup>\*</sup>. Arguably, another 3 articles (227, 229 and 268) could be added to the corpus of Albanian defamation Law. Articles 119 (Insult) and 120 (libel) make up the core of Albanian Criminal Defamation Law.

Article 119 criminalizes insult as follows:

1. “Intentionally insulting a person shall be a criminal misdemeanour punishable by a fine or up to six months of imprisonment.
2. The same offence, when committed publicly to the detriment of several people, or more than once, shall be a criminal misdemeanour punishable by a fine or up to one year of imprisonment.”

Article 120 (Libel) reads the following:

1. “Intentional dissemination of utterances and/or any other information, which are knowingly false, and which affect the honour and dignity of a person, shall be a criminal misdemeanour and is punishable by a fine or up to one year of imprisonment.
2. The same offence, when committed publicly, shall be a criminal misdemeanour punishable by a fine or up to two years of imprisonment.”

Unlike, article 120, which deserves most of our attention<sup>\*</sup> for the purposes of this conference, article 119 leaves much room to Albanian courts for manoeuvre. Namely, the courts have had to establish the categories of conduct that constitute insult, the meaning of public insult etc.

Clearly, article 120 sets a threshold of evidence that is high enough to discourage abuses of the right to reputation. Namely, the following elements are to be met in order to have smb. punished for libel:

- the disseminated information has to be false;
- it must be showed that the defendant was fully aware of the falsity of the information;
- it must be shown that there is a casual link between the false information disseminated by the defendant and the damage occurred to the honour and dignity of the defamed person.

It is fair to conclude that Albanian criminal defamation law provides a good substantive regulation the notion of defamation. Namely, the burden of proof is strictly put on the claimant who is invited to prove defamation beyond reasonable doubt. Furthermore, the law makes it clear that defamation shall be considered committed only when the falsity of the statement, the intention to defame as well as actual knowledge of falsity are proved beyond any reasonable doubt (article 120).

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<sup>\*</sup> Art. 119 (insult); Art. 120 (libel); Art. 239 (insulting a public official on duty); Art. 240 (libeling of a public official on duty); Art. 241 (defamation of the President of the Republic)

<sup>\*</sup> There is not much public value in an insult. Additionally insult is easier to identify than libel as it usually is performed by use of a specific language.

In other words, if the alleged defamation is a true fact the defendant shall be deemed free from any responsibility. Additionally, the defendant shall be deemed free of any responsibility if defamatory intent on his/her side is not proved.

Insult and libel against public officials are regulated by a separate chapter of the Albanian Criminal Code. That chapter is titled “Crimes against the Authority of the State”<sup>\*</sup>. The definition of the crimes is very much the same as in the general insult and libel. Namely, the information or rumours have to be knowingly false and intentional. The same goes for the level of punishments on libel. Punishments for insult of public officials are however, higher than those reserved for simple insult. Clearly, the aim here is to provide special protection to persons who perform public duties and who become victims of defamation for reasons that are connected to their public functions.<sup>\*</sup>

From a procedural point of view, defamation suites can be filed directly with the court by the alleged victims of defamation. This marks an exception to the general rule of Albanian criminal procedure according to which crimes are prosecuted by the prosecution office upon the request of private parties or *ex officio*. A remark is due here however. Public officials who bring defamation suits under articles 239 and 240 of the Criminal Code enjoy certain procedural advantages compared with private citizens who file their complaints directly with the courts under articles 119 and 120. Article 59 of the Criminal Procedure Code of Albania enumerates those exceptional cases when an injured plaintiff can file suites directly with the courts. Insult (art. 119) and libel (art. 120) are duly included in this list. However, article 59 of the CPC does not mention articles 239 (insult of public officials) and 240 (libel of public officials). The conclusion to be drawn here is that public officials who allege to be victims of insult or libel under articles 239 and 240 need only file a complaint with the public prosecution and the latter will investigate and present the case in the court.

The aforementioned procedural advantage has certainly the potential to grant public officials a greater degree of protection against potentially legitimate criticism by the public since they can avail of the resources and the authority of public prosecution office. All this, at a time when the European Court of Human Rights has been able to articulate, in a string of cases, the important principle that public officials must be more open to public scrutiny than private citizens.

However, an important distinction is due here. The procedural advantage enjoyed by public officials who become victims of insult or libel in the exercise of their duties does not mean that it is possible under Albanian Law to use a criminal action for libel to protect the reputation of the Government as such. The most likely interpretation of the above-cited provisions (articles 239 and 240) is that their aim is to protect from defamation the private character and behaviour of public officials rather than the governing reputation of the institutions they represent. Moreover, Albanian public officials that have been involved in libel proceedings have never filed their suits under the disputed articles 239 and 240 and, therefore, have not availed of the said procedural advantage.

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<sup>\*</sup> Chapter VIII of the Albanian Criminal Code

<sup>\*</sup> it is curious that in practice the courts have interpreted this protected category to include providers of public services such as teachers. High level officials tend to prefer action based on articles 119 and 120.

Additionally, there exist some provisions in Albanian criminal law which link defamation to official persons and objects and therefore constitute a deviation from the original notion that libel and insult can be committed against private persons alone. The most important exceptions to the presumption that criminal defamation provisions are primarily intended to address unwarranted attacks on personal reputation are the following:

Article 227 – Insulting representatives of foreign countries;

Article 229 – Insolent acts against the anthem and the flag;

Article 268 – Defamation of the Republic and its symbols.

Whereas journalists and the public opinion are increasingly aware of the limits imposed on freedom of speech for the sake of protection of the reputation of individuals, they question the appropriateness of having defamation provisions in place for the protection of objects such as the national flag and the other symbols. Also there is a growing dissent concerning article 227 which aims to award to foreign dignitaries special protection from defamation. Clearly, all these provisions are somewhat distant from the original concept of the drafters on defamation as an injury against simple individuals. As such, these provisions have prompted a hot scholarly debate.

*Civil Defamation* – Although criminal law remains the primary means for obtaining redress in cases of unwarranted attacks on personal dignity and reputation, civil remedies are possible under Albanian law as well and, what is more, they (*the civil remedies*) are increasingly (*starting from 1998*) resorted to by the aggrieved parties. However, certain flaws interest civil remedies against defamation in the context of the Albanian legal framework.

Namely, whereas criminal sanctions are predictable to a considerable extent, Albanian courts have not, up to date, established tests that would make the outcome of a civil proceeding against defamation as predictable. Nevertheless this is a fully evolving body of law and the courts seem to have mastered adjudication considerably over the last 6 years since the adoption of the Civil Code.

Civil defamation law in Albania is characterised by yet another problem. Namely, bringing an action in court on grounds of alleged defamation is practically not subject to any limitation period. Article 113 of the Albanian Civil Code stipulates that actions aimed at achieving satisfaction for injuries caused by the violation of personal, non pecuniary rights (*reputation falling clearly under this category*) could be raised at any time. Such an arrangement has the potential to bring about a state of general uncertainty as critics could be held liable at any time for very early statements. On the other hand, the defendant's capacity for proper defence would be severely diluted by the fact that their case is judged long after the time when real life facts prompted the contested journalistic statement.

Although no serious study on existing case law concerning civil defamation exists, it may be safely maintained that civil redress is becoming increasingly commonplace as injured parties have come to experience the reluctance of the courts to award criminal penalties in cases of defamation. Last but not least, the injured parties have come to appreciate the real comfort financial compensation may bring about.

In one of the most celebrated cases, a cabinet minister obtained a serious compensation following a court proceeding against an opposition newspaper.

Additionally, in the course of an Albanian civil defamation proceeding, the plaintiff does not need to prove actual loss from the defamation. Damage to the reputation is presumed. This makes the civil proceeding resemble a punitive criminal proceeding rather than an exercise aimed at evaluating the damage occurred. The fact that damages are sought in the context of the overall criminal proceeding is perhaps the reason for this distortion.

Yet another controversial issue concerning civil defamation in Albania is that Albanian law enables individuals to sue for damages on behalf of deceased people. Article 625, paragraph b of the Civil Code states that the surviving spouse or relatives up through the second scale, may seek compensation if the memory of a dead person is desecrated. This provision is believed to have the potential to prevent journalists from making critical historical analysis, thus depriving the society from an important set of information. Traditionalists, on the other hand, tend to stick to the present arrangement arguing that ethical journalism is the ultimate guarantee to journalistic freedom, rather than the reshaping of the legal system.

### 3. Conclusions

- With the notable exceptions noted above, Albanian defamation law is no exception in terms of any particular arrangement that would be detrimental to freedom of speech by definition.

However, Albanian judicial practice has revealed the following problems:

- The approach taken by Albanian Courts when adjudicating libel actions is of an *ad hoc* nature. In other words, there is a detailed consideration of facts in the course of each individual proceeding for defamation. However fair such an approach may sound, inevitably, it drives the courts to place undue emphasis on the particular harm suffered by the individual, thus ignoring the long term effect of libel action on freedom of speech;
- Judges tend to skip the free speech angle as no judicial doctrine has been devised by the High Court\* to balance free speech interests and the right to individual reputation in the course of judicial proceedings;
- The courts have not spelled out clearly enough the important distinction comment and allegation of fact;
- No difference in treatment between cases involving private persons and public officials has been enshrined so far in the judicial practice concerning actions for defamation.

The public opinion is divided over the rightfulness and the considerable incidence of compensations awarded in cases of defamation. Some argue that this is an indication of an increasing pressure on free press, an attempt to prevent legitimate criticism of officials or the exposure of government wrongdoing.

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\* Admittedly the High Court has not had many opportunities to spell out the much needed principles for the adjudication of defamation cases.

Others, a perceived majority, believe that such high incidence of court rulings in favour of injured parties is but a reflection of the fact that the Media is highly unethical.

As a conclusion it may be plausibly maintained that a little effort shall easily bring Albania into line with European standards and give substance to its constitutional doctrine which is very much supportive to freedom of expression.

## **IX. INSULT and DEFAMATION as crimes under the Bulgarian legislation – Legal regulation and court decisions of the Supreme Court of Cassation of the Republic of Bulgaria, Penal Committee**

Document prepared by Mrs Teodora Stambolova, Judge at the Court of Appeal, Sofia

1. Insult and defamation are regulated in Art. 146 and Art. 147 of the Penal Code of the Republic of Bulgaria and they are crimes against the good name, the honour and the dignity of the person. The latter are personal and indefeasible moral goods. The good name of a person is the positive public appraisal for the victim, his reputation in society as a person with high morality and professional competence, as a person deserving respect for these qualities. Honour and dignity are moral-ethic categories referring to the due respect to the personal qualities of the victim, to his principles, to his reputation and the honour and respect, which people owe to each other. Though honour and dignity are related, usually honour is connected with the positive public appraisal for the person, and dignity – with the self-appraisal of the person for his own public significance.

Art. 146, para. 1 of the of the Penal Code provides for that a person, who says or commits anything humiliating for the honour or dignity of anyone else in the presence of the latter is punished for insult with a fine ranging from BGN 1,000 to 3,000. A victim could be a specific individual, which should be in a state to apprehend the offensive phrases /for instance obscene phrases/ or actions /for instance a slap in the face/, and to be able to form conscience and the feeling for honour and dignity. The humiliating character of the words said or actions committed is assessed on the basis of the moral standards for normal communication, which are accepted in society and thus, the personal views of the individual, to which the insult is directed, are irrelevant for the penal law estimation.

Insult is committed only by means of acts of commission and it could have various forms: oral form – by saying directly offensive qualifications in the presence of the victim; in writing – by means of a letter, telegram, publication in the press. What is important is the victim to be able to apprehend the offensive words or actions, which is the meaning of the phrase “in his presence”. That is why the publication in the press or a TV or radio broadcast containing certain epithets could be qualified as insult, even if the offensive phrases are not said in the presence of the victim in the narrow sense of this phrase.

Art. 147, para. 1 of the Penal Code provides for that defamation is a deliberate divulgence of an untrue disgraceful circumstance for another person or fastening to him a crime on, which this person has not committed. The punishment is a fine ranging from BGL 3,000 to 7,000 and public censure.

The victim should always be a specific individual and if he is not specifically named, there is no defamation – for instance upon directing defamatory statements to a certain category of people.

Divulgence is disclosing to a third person a certain non-existing disgraceful circumstance, which the offender connects with the personality of the victim. The disgraceful circumstance is a statement for the existence of a certain fact, which the offender connects with the personality of the victim, whereas this fact could injure the good name of the latter in the society. It could refer to past or present behaviour of the victim, which is reproachable in accordance with the prevailing morality; it could concern events from the personal life /assault, adultery/ or reflect facts, which give negative characteristics of the personality of the individual. The circumstance divulged should always be UNTRUE.

The second form of defamation is fastening a crime on to the victim, for which the offender states before a third person that the crime is committed. In addition, the crime should be a specific one, but it should always be NON-COMMITTED.

Under Art. 147, para. 2 of the Penal Code the offender is not punished if the truthfulness of the circumstances divulged or the crime fastened on is evidenced. Therefore, a rebuttable presumption is established that each disgraceful circumstance is untrue and that each fastened crime on is not committed. The burden to prove the opposite lies with the offender – /respectively the defendant in a civil case/. In the light of the present seminar the burden of proof for the establishment of the untruthfulness of the facts presented in a publication lies with the author of the publication and respectively with the publisher /the party establishes the facts, from which it obtains favourable legal consequences/.

As it was mentioned above the law does not require the defamation to be accomplished in the presence of the victim. The presence of the latter will be relevant only if the defamation is made in an insulting form and it affects simultaneously both the self-estimation of the victim /insult/, and the public appraisal of the victim /defamation/. In this case, there will be an ideal aggregation of insult and defamation – interpreting decision 12-71 of the General Meeting of the Penal College of the Supreme Court of the Republic of Bulgaria.

Insult and defamation under the Penal Code could be committed both under direct and eventual /indirect/ malice. The first means that subjectively, the acting person is aware of all objective characteristics of the crimes and he aims the insult to be apprehended by the victim and the defamation – to be made known to a third person. Under indirect malice, the acting person is indifferent to the possibility the victim to apprehend the insult. Upon defamation, the acting person agrees with the possibility his statement to be untrue and he admits that the defamatory statements might not reach the conscience of a third person.

The qualified cases of these crimes are provided for in Art. 148 of the Penal Code of the Republic of Bulgaria. The insult is punished with a heavier punishment – fine ranging from BGL 3,000 to 10,000 and public censure – when it is committed in public /in the presence of at least one more person, other than the victim/; when the insult is distributed by means of a printed edition or by other means. “The printed edition” as per the court practice of the Republic of Bulgaria supposes that a lot of copies are distributed to an unlimited number of people – decision 623-74-1 of the Penal Committee of the Supreme Court of the Republic of Bulgaria.

“By other means” signifies that there should have been a possibility the insult to become generally known to a large number of persons – decision No 280-72-2 of the Penal Committee of the Supreme Court of the Republic of Bulgaria.



The aforesaid refers both to the responsibility of the journalists working in the press and the journalists working in TV or radio broadcasts or ones making films.

In addition, there are qualified cases, when the insult is committed TO or BY an official or socially active person during or on the occasion of the performance of his office or functions.

The enumerated qualified cases refer to the defamation as well – Art. 148, para. 2 of the Penal Code, however the law provides for a higher responsibility – the punishment is a fine ranging from BGL 5,000 to 15,000 and public censure. This punishment is imposed also for defamation, which has caused severe consequences. The latter are unfavorable changes in the personality or the public status of the victim, which are direct consequence of the defamation and they DO NOT include the infringement of the honour and the dignity of the personality. For instance divorce, mental disorder, dismissal from work, lowered job position, which have occurred as a result of the accomplished defamation. There is no impediment if such consequences have occurred the journalists, who have defamed the victims, to be subject to penal responsibility for such qualified cases.

Pursuant to Art. 161 of the Penal Code the penal pursuit for committed crimes under Art. 146 – 148 of the Penal Code is initiated upon request of the victim. The so-called penal lawsuits of private character are held and the persons, subject to the insult and the defamation are the accusers and the offender and the defamator are the defendants.

In addition to the aforesaid decisions of the Supreme Court of the Republic of Bulgaria, I would like to quote several more, which could be related to the actions of journalists. As per decision No 22/31.01.95 of 3<sup>rd</sup> Penal Committee of the Supreme Court of Cassation of the Republic of Bulgaria under penal case 558/94 the difference between insult and defamation lies within the contents of the objectified information, referring to the victim – upon insult the offender gives his own negative estimation of the person by means of epithets, qualifications, comparisons, curses, etc. and upon defamation the offender divulges untrue disgraceful circumstances or fastens to the victim a crime on, which is not committed, whereas the offender states that these are facts of the objective reality. Namely the said characteristics of the defamation are the contents of the objective features of this crime and NOT subjective estimation judgments and conclusions, which are not part of the objective reality. That is why according to decision No 80/09.03.98 of 2<sup>nd</sup> Penal Committee of the Supreme Court of Cassation of the Republic of Bulgaria under penal case 766/97 no penal responsibility could be born for another's conclusions, judgments and assumptions.

The main part of the lawsuits brought up by victims, who consider themselves offended and/or defamed are versus journalists in printed editions for their publications and against the editions themselves. That is why the practice of the Supreme Court of Cassation of the Republic of Bulgaria, under the Penal Code is most developed in this regard. I would like to point out only two decisions, which however, are fundamental. They outline the due behaviour of the journalist and respectively the behaviour of the assignor of the work.

As per decision No 11/26.05.00 under penal case 23/00 of 2<sup>nd</sup> Penal Committee of the Supreme Court of Cassation of the Republic of Bulgaria, whenever the necessary check for the truthfulness of the information is made in accordance with the established journalist practice, the internal factual rules of the respective editorial staff or publishing house by means of using the objectively existing and possible sources of information, there is a professional good faith, which excludes the penal and civil responsibility for defamation. As per decision 745/ 20.08.1991 under penal case 621/91 of 3<sup>rd</sup> Penal Committee of the Supreme Court of the Republic of Bulgaria, whenever a press publication discloses facts for a certain individual, which are based on data, disclosed in other publications, there is no intention for defamation, when the untruthfulness of the circumstances has not been realized.

2. In the context of Art. 10 of the European Convention of Human Rights (ECHR) and in the context of Art. 19 of the General Declaration of Human Rights /each individual has the right to seek, receive and distribute information and ideas by all means and without regard to state boundaries/, after the events on 10 November 1989 a new Constitution of the Republic of Bulgaria was adopted. Further, there are also decisions of the Constitutional Court of the Republic of Bulgaria, which was formed after 10 November 1989. Pursuant to Art. 39, para. 1 of the Constitution of the Republic of Bulgaria each person has the right to express his opinion and to distribute it by means of words, in writing or orally or by means of sounds, pictures, or by any other means. Under Art. 41, para. 1 of the Constitution of the Republic of Bulgaria each person has the right to seek, receive and distribute information. However, BOTH mentioned rights could not be exercised for infringement of the rights and the good name of another person or of any other valuables established by the Constitution /Art. 39, para. 2 and Art. 41, para.2 of the Constitution of the Republic of Bulgaria/. There are restrictive grounds also in Art. 10, para. 2 of ECHR, which allows the exercising of the freedom to express an opinion to be subject to procedures, conditions, restrictions or sanctions, provided for by the law, necessary for a democratic society and to the interest of purposes, which have been duly indicated. This is so whenever the reputation and the rights of others are concerned.

Pursuant to decision No 21/14.11.96 of the Constitutional Court of the Republic of Bulgaria under constitutional case 19/96 the rights granted in Art. 39-41 of the Constitution of the Republic of Bulgaria oblige the state to restrain from interfering in their exercising. Their limitation is admissible only for the purpose of safeguarding other rights and interests, which are also defended by the Constitution, and could be accomplished only on the grounds, provided for by the Constitution. The possibility for interference in the right to express an opinion is highest, whenever this is used for infringement of the rights and the good name of another person, in so far as exactly in this way the honour, the dignity and the good name of the person are safeguarded – Art. 4, para. 2 and Art. 32, para. 1, sentence 2 of the Constitution of the Republic of Bulgaria. This constitutional limitation does not mean in any case that public criticism will lack, especially to political figures, state officials and state bodies.

Both the ECHR and the Constitution of the Republic of Bulgaria specify the values, whose defence is the grounds for limitation of the right to freedom to express opinions. They cover the inherent to the personality honour, dignity and good name. Pursuant to decision No 20/14.07.98 of the Constitutional Court of the Republic of Bulgaria under constitutional case 16/98, the aforesaid values are object of encroachment upon the insult and the defamation.

Therefore, the penal and civil responsibility for insult and defamation, as a means of defence of the honour, the personal dignity and the good name is such a limitation of the right to express opinions, which is admissible both by the Constitution of the Republic of Bulgaria and by the convention.

Certainly, this is admissible only if the restrictive measure is proportionate to the character of the defended interest. In this sense, pursuant to Art. 10, para. 2 of the ECHR the restriction should be NECESSARY in a democratic society. As per decision No 7/96 of the Constitutional Court of the Republic of Bulgaria under constitutional case 1/96, the degree, in which the restriction of the right to freely express opinion is admissible depends on the significance of the interest, which is also estimated as subject to constitutional defence. Therefore, each particular case should be considered separately in connection with the criteria set above.

3. Pursuant to Art. 45 of the Obligations and Contracts Act, each person shall remedy the damages, caused by fault to another person. As per Art. 49 of the Obligations and Contracts Act, the person, who has assigned work to another person shall be liable for the damages caused by the latter during or on the occasion of this work. Therefore, whenever it is concluded that someone, in particular a journalist, has offended or defamed someone else, the former will bear civil responsibility. In so far as it is provided for faulty behaviour at all, even if it is found that there is no crime committed under the Penal Code, due to the fact that there is no malice, the civil responsibility still exists since the deed is done inadvertently. In all cases however, the faulty behaviour should be established.

The same refers also to the assignor of the work whenever the damages are caused by fault by the person, assigned with the work by means of acts of commissions, which are accomplishment of the work assigned or by means of acts of omissions arising under the law or under other rules; whenever the damages are caused by fault by the person, to whom the work is assigned by means of acts of commissions, which do not represent performance of the work assigned, but they are directly related thereto; and whenever the person, who has caused the damage has violated the instructions given to him for the accomplishment of the work assigned. In this regard is Decree No 9 dated 28.12.66 of the Plenary Session of the Supreme Court of the Republic of Bulgaria.

As per this Decree no responsibility under Art. 49 of the Obligations and Contracts Act arises whenever the damage is a result of personal relations between the offender and the offended person, even if these relations have arisen during or on the occasion of the performance of the work assigned.

According to Decree No 9 dated 25.12.61 of the Plenary Session of the Supreme Court, amended by means of Decree No 7/87 of the Plenary Session of the Supreme Court, the civil claim under Art. 49 of the Obligations and Contracts Act is rejected when it is found out that the act of commission is performed not by the defendant, but by another PARTICULAR person, for whom the civil defendant /the assignor of the work/ is responsible. Whenever it is found out that the act of commission is accomplished by a person, for whom the civil defendant is responsible, but it could not be specified who is this person, the civil claim should be awarded. The aforesaid refers most to assignors of work to persons, who prepare their materials under a pseudonym or in the case of editorials.

Under the Bulgarian civil law, in the cases discussed above, when the respective claims are raised, there is no impediment both material and non-material damages to be awarded, whereas their grounds and their amount are subject to proving before the court. This is the procedural solution and it does not ignore the provision of Art. 45, para. 2 of the Obligations and Contracts Act, under which in all cases of tort the fault is presumed until proving the opposite. Whenever the claims for tort are raised in a penal lawsuit, first the act of commission, subject of the indictment is examined and the rules of the penal jurisdiction and the presumption of innocence are applied. Therefore, the issue for the fault is decided upon in the penal procedure.

In practice claims for inflicted material damages are not brought up because of the difficulty of their evidencing, mainly of the chain of causation between the damage and the subsequent material unlawful result – for instance because of the defamatory article in the press the offended person has not been able to conclude a specific contract with property clauses, which could be evidenced, for which contract negotiations have been held, and this happened namely because of the publication.

In view of the subject of the present seminar I would like to point out several more decisions of the Civil Committee of the Supreme Court of Cassation of the Republic of Bulgaria, which refer to the issues discussed. Pursuant to decision No 340/15.07.98 under civil case 178/97 the publisher of a printed edition is responsible for non-material damages caused by the authors of the articles, published in this edition, which contain insulting or defamatory qualifications with reference to the persons envisaged in the articles. The responsibility arises from his capacity of employer, in so far as the accomplishment of actions in his interest are concerned, whereas the latter fall within the field, in which he exercises his own activity and the result of this activity, though performed by another person, will give a reflection in his property. The fact whether the authors of the publications work for him under employment relationship or are free-lance journalists, is irrelevant.

Pursuant to decision No 648/15.04.99 of the Supreme Court of Cassation, 5<sup>th</sup> Civil Committee, under civil case 267/98 the publisher of a printed edition is responsible for the non-material damages, inflicted by publications with UNTRUE contents, which infringe the dignity and the public prestige of the offended person. This idea is further developed in decision No 397/ 06.06.01 of 4<sup>th</sup> Civil Committee of the Supreme Court of Cassation of the Republic of Bulgaria under civil case 1558/00. The freedom of information, reads the decision, and the right of the people to be informed are brought to an activity, in which the facts and events, subject of the informing should be transmitted correctly and they should reflect the truth. The news announced could be unpleasant and disgraceful, but the usage of phrases, conveying the personal estimation of the person presenting the information – insulting, humiliating the dignity of the person described on the occasion of the activity of the latter – or connecting untruthfully this activity with this specific person, is an infringement under the sense of the law. In the same decision it is accepted that the employer – publisher bears responsibility for the defamatory actions accomplished by his employees, because of the fact that the cultural policy for the contents, the language and the means of expression of the newspaper depend on the will of the employer /in the particular case the media is a newspaper/. The obligations of the publisher require that he follows for the way, his newspaper is written and the culture of its editing.

## **Part B: Legal provisions concerning defamation, libel and insult**

Strasbourg, 22 February 2000  
[mmshr\2000\9\MM-S-HR (2000) 4 (A)]  
S-HR (2000) 4

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### **GROUP OF SPECIALISTS ON MEDIA LAW AND HUMAN RIGHTS**

**(MM-S-HR)**

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**The dissemination of information and opinions in the media  
about political figures and public officials:  
Collection of case-law of the European Court of Human Rights**

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**Secretariat Memorandum prepared by the  
Directorate General of Human Rights**

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## I. Brief overview of related legislation in selected European countries

(Prepared by: the Media division, DG II, Directorate General of Human Rights)

### Introduction:

This survey gives a brief overview of legal provisions concerning defamation, libel and insult in 32 European countries. Provisions in Criminal Codes as well as Civil Codes and other legislation are taken into account.

The survey is updated until February 2003.

The following sources have been used for this survey:

*Dissemination of information and opinions in the media about political figures and public officials*, discussion paper by Monica Macovei (Romania), Council of Europe, 1999

*Defamation – overview of law and practice in five South-East European countries*, presentation by Peter Noorlander (Article 19), Regional conference on defamation and freedom of expression, Strasbourg, 17-18 October 2002

*Freedom of Expression and Access to Information in Southeastern and Central Europe*, International Helsinki Federation for Human Rights, Vienna, June 2001

EMIS (Europäische MedienInformationsSystem) database, Institute of European Media Law (Institut für Europäisches Medienrecht), Saarbrücken

*Defamation of public figures*, presentation by Vesna Alaburic (Croatia), Regional conference on defamation and freedom of expression, Strasbourg, 17-18 October 2002

*Insult laws: an insult to press freedom*, by Prof. Ruth Walden, published by the World Press Freedom Committee, 2000

*International Journalists' Network (IJNET)*, media law library,  
[http://www.ijnet.org/Media\\_Laws\\_Search.html](http://www.ijnet.org/Media_Laws_Search.html)

**N.B. The information about countries marked with an asterisk (\*) was valid as of 1999**

### Albania

In Albania, like most civil law countries, libel is predominantly a criminal offence. Private law suits for damages, although possible, are relatively unusual.

### **Criminal Code**

Albanian Criminal Defamation Law consists of 5 Articles of the Criminal Code \*. Arguably, another 3 Articles (227, 229 and 268) could be added to the corpus of Albanian defamation Law. Articles 119 (Insult) and 120 (libel) make up the core of Albanian Criminal Defamation Law.

Article 119 *criminalises insult as follows:*

3. “Intentionally insulting a person shall be a criminal misdemeanour punishable by a fine or up to six months imprisonment.
4. The same offence, when committed publicly to the detriment of several people, or more than once, shall be a criminal misdemeanour punishable by a fine or up to one year imprisonment.”

Article 120 (Libel) reads as follows:

3. “Intentional dissemination of utterances and/or any other information, which are knowingly false, and which affect the honour and dignity of a person, shall be a criminal misdemeanour and is punishable by a fine or up to one year imprisonment.
4. The same offence, when committed publicly, shall be a criminal misdemeanour punishable by a fine or up to two years imprisonment.”

Article 239 *insulting a public official on duty:*

Insulting intentionally an official acting in the execution of a state duty or public service, because of his state activity or service, constitutes criminal contravention and is sentenced to a fine or up to six months imprisonment.

When the same act is committed publicly, it constitutes a criminal contravention and is sentenced to a fine or up to one year imprisonment.

Article 240 *libelling of a public official on duty:*

Intentional defamation committed toward an official acting in the execution of a state duty or public service, because of his state activity or service, constitutes criminal contravention and is sentenced to a fine or up to one year imprisonment.

When the same act is committed publicly, it constitutes criminal contravention and is sentenced to a fine or up to two years imprisonment.

Article 241 *defamation of the President of the Republic:*

Intentional defamation committed toward the President of the Republic is sentenced to a fine or up to three years imprisonment.

Some provisions in Albanian criminal law link defamation to official persons and objects:

Article 227 *Insulting representatives of foreign countries:*

Insulting prime ministers, cabinet members, parliamentarians or foreign states, diplomatic representatives, or recognized international bodies that are officially in the Republic of Albania, is sentenced to a fine or up to three years imprisonment.

Article 229 *Insolent acts against the anthem and the flag:*

Using words or committing acts which publicly insult the flag, emblem, anthem of foreign states and recognized international bodies, as well as taking away, breaking, irrepa-

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\* Art. 119 (insult); Art. 120 (libel); Art. 239 (insulting a public official on duty); Art. 240 (libelling of a public official on duty); Art. 241 (defamation of the President of the Republic)

rably damaging the flag or emblem, which are displayed in official institutions, constitutes criminal contravention and is sentenced to a fine or up to one year imprisonment.

*Article 268 Defamation of the Republic and its symbols.*

Defamation, made publicly or through publications or distribution of writings, of the Republic of Albania and her constitutional order, flag, emblem, anthem, martyrs of the nation or abolishing, damaging, destroying, making indistinct or unusable the flag or emblem of the Republic of Albania exposed by official institutions, constitutes criminal contravention and is sentenced to a fine or up to two years imprisonment.

**Civil Code**

Under Article 625 of the Albanian Civil Code, a person who has suffered ‘harm to the honour of his personality’ has a right to compensation.

**Andorra**

**Constitution**

La diffamation est traitée par la Constitution. Celle-ci garantit le droit à l’intimité, à l’honneur et à la propre image (Article 14).

**Code Pénal**

De même, elle est traitée par le Code pénal, dans le Titre III du Chapitre III, qui se réfère aux délits contre l’honneur des personnes.

Ainsi le Code pénal punit d’une peine maximale d’emprisonnement de deux ans et un mois l’auteur d’injures et de diffamations graves proférées publiquement ou publiées par écrit ou par un moyen de communication sociale (Article 200). En outre, il punit d’une peine maximale d’emprisonnement de trois ans quiconque, par écrit ou par un moyen de communication sociale, aura imputé à une autre personne la commission d’un délit (Article 201).

D’autre part, le Titre III Chapitre V du Code pénal définit les lois protégeant l’intimité des personnes. Il dispose que quiconque qui aura divulgué des éléments de la vie intime d’une personne dans le but de nuire ou de porter atteinte à sa réputation sera puni d’un emprisonnement d’une durée maximale de trois ans (Article 218). D’autre part, il affirme que ceux qui, pour porter atteinte à l’intimité d’une personne, se seront emparés de documents ou les auront divulgués, seront punis d’un emprisonnement d’une durée maximale de trois ans (Article 220).



Enfin, il indique que lorsque les délits visés dans ce chapitre auront été commis à travers l'impression ou un quelconque moyen qui en facilite la publication, l'auteur et le directeur en seront responsables pénalement (Article 221).

Enfin, le Titre V, Chapitre II du Code pénal, se réfère aux délits contre l'honneur, la dignité et la liberté des personnes, et dispose que l'auteur d'injures ou de diffamations graves ou de calomnies non exprimées publiquement ni publiées par écrit ni par un moyen de communication sociale, sera puni d'un emprisonnement d'une durée maximale d'un an (Article 312). De plus, il punit la divulgation de toute information personnelle confidentielle, tant officielle que professionnelle, avec un emprisonnement d'une durée maximale d'un an (Article 314).

## **Armenia\***

### **Criminal Code**

Art. 131: "Defamation, that is the dissemination of knowingly false information that damages another person's reputation," is punishable by a fine of up to 200 drams (c. \$.50 U.S.) or up to one year imprisonment or public reprimand. "Defamation in print or reproduced in whatever manner, or in an anonymous letter, or committed by a person previously convicted of defamation," is punishable by a fine of 100 to 300 drams (c. \$.25-\$.75 U.S.) or up to three years imprisonment or two years of corrective labour. Accusing a person of a dangerous state crime or any other serious crime, is punishable by up to five years imprisonment or two to five years exile.

Art. 132: "Insult, by either word or action, to a person's honour and dignity," is punishable by one year of corrective labour or a fine of 100 drams (c. \$.25 U.S.). If the insult is published or otherwise made public, the punishment is one year imprisonment or corrective labour or a fine of 200 drams (\$.50 U.S.). (Typical journalists' salaries are \$6 to \$20 U.S. monthly.)

### **Press Law**

1991 Law of the Press, Art. 7: Prohibits the use of the mass media for encroaching upon the personal lives of citizens, their honour or dignity.

### **Civil Code**

#### Article 19

#### *Protection of Honour, Dignity, and Business Reputation*

1. A citizen has the right to demand in court the retraction of communications impugning on his honour, dignity or business reputation, unless the person who disseminated such communications proves that they correspond to reality.  
On demand of interested persons, the protection of honour and dignity of a citizen is permitted also after his death.
2. If the communications impugning the honour, dignity or business reputation of a citizen were distributed in media of mass information, they must be retracted in the same media of mass information.  
If the aforementioned communications are contained in a document emanating from an organisation, such a document is subject to replacement or recall. The procedure for retraction in other cases shall be established by the court.

3. A citizen with respect to whom a medium of mass information has published communications infringing on his rights or interests protected by statute has the right to publication of his answer in the same medium of mass information.
4. A citizen with respect to whom communications have been disseminated impugning his honour, dignity or business reputation, has the right together with the retraction of such information also to demand compensation for the damages caused by their dissemination.
5. If it is impossible to identify the person who disseminated communications impugning the honour, dignity or business reputation of a citizen, the person with respect to whom such information was disseminated has the right to apply to court with a request for the recognition of the communications that were disseminated as not corresponding to reality.
6. The rules of the present article on the protection of the business reputation of a citizen shall be applied correspondingly to the protection of the legal reputation of a legal person.

### Austria\*

Both *civil and criminal liability* are provided for by the law.

*Defence.* Under Article 29 of the **Media Act** (1981), the strict burden of proof of the truth (in criminal cases) has been relieved; under the 1981 Media Act, journalists are not guilty of libel if they are able to establish both that they observed journalistic care and that there was a major public interest in the publication.

*Public Figures.* The relevant provisions of the Criminal Law (Article 111 of the Penal Code) and of the civil law (Article 1330 of the Civil Code) apply to value judgements as well as to statements of fact. Following decisions of the European Court of Human Rights, the status of the insulted person is considered and the courts have shown readiness to require politicians to accept a greater degree of criticism and scrutiny regarding matters, which may affect their qualifications for public service than private persons.

*Invasion of privacy.* The 1981 Media Act introduced a separate cause of action for invasion of privacy: Article 7 provides that a media organ is obliged to grant compensation if matters concerning the private life of a person are presented in such a way as to degrade him or her in public opinion. Publication is permitted in any case where there is a “connection with public life”. However, little use has so far been made of Article 7. It appears that reporting on matters of legitimate public interest is not inhibited by this provision.

Article 78 of the **Copyright Act** forbids the publication of pictures which violate legitimate interests of the person shown. A few courts have found that there was no violation in case of pictures of “public figures”.

### **Criminal Code**

The offence of “defamation” is regulated in Article 111 of the Criminal Code. It is committed if a person accuses another, in such a way that it may be perceived by a third person, of possessing a contemptible character or attitude or of dishonourable behaviour or of behaviour contrary to morality which is suited to make him contemptible or otherwise lower him in public esteem.

This offence carries a higher punishment if committed in a printed document, by broadcasting or otherwise in such a way as to make the defamation accessible to a broad section of the public.

Article 113 prohibits a person from reproaching another for having committed a criminal offence in respect of which the sentence has already been served or provisionally suspended, or in respect of which the determination of the sentence has been provisionally adjourned. Reproach is only justified (pursuant to Article 114) if required by a legal duty, protected by a legal right, or compelled for special reasons. In the case of *Schwabe v. Austria*, the European Court of Human Rights ruled that a conviction under Article 113 violated Article 10 of the ECHR because the Austrian courts refused to consider it as a defence that the reproach was in the public interest (namely, that a politician's prior conviction for a driving accident which resulted in the death of a person could be relevant to his fitness for political office).

Moreover, the Criminal Code contains a provision on "slander and assault" (Article 115). This offence is committed if a person insults, mocks, mistreats or threatens with ill-treatment another one in public or in the presence of several other, unless the offender is liable to a more severe punishment under a different provision. The offence must take place in public or in the presence of several other persons and the offender must have taken his fact into account when committing the offence.

In addition, the Criminal Code contains a provision on "malicious falsehood" (Article 297). This offence is committed if a person falsely accuses a specific person or several other specific persons in such a way as to expose such person or persons to the risk of prosecution. The offender is not liable to punishment if he removes the risk of prosecution voluntarily and in due time.

Article 248 of the Criminal Code deals with the "disparagement of the State and its symbols". This offence is committed if the Republic of Austria or one of its constituent States is maliciously insulted or degraded in such a way that it is perceived by a broad section of the public. Similarly, a person commits this offence if he maliciously insults, degrades or disparages in the mentioned manner the flag of the Republic of Austria or one of its States shown on a public occasion or at a publicly accessible event, a national emblem attached by an Austrian authority, the federal anthem or a State anthem.

The offence of "prohibited publication (Article 301) is committed if, in contravention of a statutory prohibition, a statement on the content of a non-public hearing before a court of law or an administrative authority is published in a printed document, by broadcast or otherwise in such a way as to make the statement accessible to a broad section of the public.

*Insults to Government institutions or officials.* Certain public authorities and organisations (including the Federal Parliament and the national army) are protected against defamation by Article 116 of the Criminal Code. National courts have not used these provisions against the press.

## **Azerbaijan\***

### **Criminal Code**

The Criminal Code from September 2000 contains three provisions on insults. While Article 147 provides for punishment of insults in the form of information that the author knew to be false, Article 148 sanctions insults, i.e. statements that undermine someone's reputation or dignity, even if the statement is true.

Article 323 provides for the punishment of anyone who discredits or undermines the reputation of the President of the Republic. The penalty may be up to two years of forced labour or imprisonment. For particularly serious crimes, the sentence is two to five years imprisonment.

## **Belgium**

### **Code Pénal**

Le chapitre V du titre VIII du livre II du Code Pénal a pour objet les infractions qui portent atteinte à l'intégrité morale des personnes. Les différents délits retenus dans ce chapitre du Code Pénal ont ceci de commun qu'ils portent atteinte à l'intégrité les uns des autres par certains éléments propres qui tiennent soit à la précision ou à la preuve du fait imputé, soit au mode d'expression ou à la publicité de l'imputation, soit à la relation existant entre la personne offensée et celle à qui l'imputation est adressée.

Dans le Code Pénal, les atteintes à l'honneur sont classées en : calomnie et diffamation (Art. 443, 444, 446, 447, 450 et 451), divulgation méchante (Art. 449), dénonciation calomnieuse à l'autorité et imputation calomnieuse contre un subordonné (Art. 445) et injure-délit (Art. 448). Pour compléter les dispositions des Articles 443 à 453, le Code Pénal réprime en son Article 561, nr. 7 toutes autres injures non prévues.

Les Articles 275 et s. du Code Pénal visent plus particulièrement les outrages s'adressant aux ministres, les membres des chambres législatives et les dépositaires de l'autorité ou de la force publique.

L'Article 447 du Code Pénal, incriminant les imputations calomnieuses à l'encontre de personnes publiques, a été complété afin de renforcer la protection des personnes soumises à de telles allégations. La modification intervenue s'appuie sur le constat que, dans la pratique, la fausseté des faits allégués ne peut souvent être établie par décision sur le fond de l'action publique (voir disciplinaire), la procédure concernée se clôturant par classement sans suite du parquet, ordonnance de non-lieu des juridictions d'instruction ou constat de la prescription de l'action publique. Le législateur a dès lors opté pour un ajout à l'Article 447 qui permet dorénavant de statuer sur l'action en calomnie, quand bien même les poursuites relatives au fait imputé n'auraient pu donner lieu à décision sur le fond.

### **Autres dispositions**

A côté de ces principales dispositions, il existe dans la législation belge d'autres textes pour réprimer les faits injurieux ou offensants. Ils visent plus particulièrement les injures ou les offenses s'adressant à certaines personnes en raison de leur rang ou de leurs fonctions. Il s'agit notamment de la loi du 6 avril 1847 pour les offenses envers le Roi et les membres de la famille royale, la loi du 20 décembre 1852 pour les offenses envers les chefs de gouvernement étrangers, la loi du 12 mars 1858 pour les outrages envers les agents diplomatiques, l'arrêté royal du 19 juillet 1926, complété par l'arrêté royal nr. 36 du 3 décembre 1934, concernant l'atteinte au crédit de l'Etat ou à la stabilité de la monnaie, la loi du 10 janvier 1955 concernant la divulgation des inventions ou secrets de fabrique intéressant la défense du territoire ou la sûreté de l'Etat.

**Bosnia and Herzegovina**

Only civil liability is provided for by the law.

Pursuant to the Articles 213 to 220 of the **Criminal Code** of the BH Federation, and Articles 80 to 87 of the Penal law of the Republic of Srpska, prison sentences were determined for libel and defamation. Considering that the existence and implementation of these provisions had a discouraging effect on journalistic freedoms in Bosnia and Herzegovina, the High Representative for Bosnia and Herzegovina suspended these Articles at the beginning of August 1999. He also ordered the entities (BH Federation and Republic of Srpska) to adopt, in association with the Office of the High Representative, necessary laws in order to establish legal remedies for libel, defamation and blasphemy in civil suits, following the European Convention of Human Rights.

On 1 November 2002, the High Representative imposed the **Law on Protection Against Defamation** of the Federation of Bosnia and Herzegovina. The Law entered into force on an interim basis, until such time as the Parliament of the Federation of Bosnia and Herzegovina adopts the same in due form, without amendment and with no conditions attached.

This Law regulates civil liability for damage caused to the reputation of a natural or legal person by making or disseminating a statement of false fact identifying that legal or natural person to a third person.

Simultaneously, the High Representative issued a decision to amend the Criminal Code of the Federation of Bosnia and Herzegovina (O.G. Federation of Bosnia and Herzegovina Nos 43/98, 2/99, 15/99 and 29/00) by repealing Chapter XX, Criminal Offences Against Honour and Reputation (Articles 213 through 220).

**Bulgaria\*****Criminal Code**

Art. 108: "A person who in any way defames the coat of arms, the flag or the anthem of the Republic of Bulgaria shall be punished by deprivation of liberty for up to one year or a fine."

Art. 146: (1) "Anyone who, through word or deed, insults the honour or dignity of a person in his or her presence" shall be punished by a fine. (2) "If the person insulted returns the insult immediately, the court may set both free."

Art. 147: (1) Criminal defamation, that is "making public infamous information about another person or attributing a crime to another person," is punishable a fine. (2) Truth is a defence.

Art. 148: (1) Public insult, that is "spread through printed material or in a different manner, of an official or representative of the public during or in connection with the fulfilment of his duties or function," is punishable by a fine. (2) Defamation of public officials under the same circumstances and defamation "with severe consequences," is punishable by a fine.

On 15 July 1998, the Bulgarian Constitutional Court upheld the constitutionality of Arts. 146, 147 and 148 of the Bulgarian Criminal Code. In its opinion, the court emphasized the existence of similar laws in many Western European countries.

On 22 July 1999, Parliament amended the Criminal Code so as to eliminate imprisonment as a penalty for insult and defamation. Six months later, Parliament decided to replace prison sentences with fines of 5,000 to 30,000 revalued levas (c. \$2,500-\$15,000 U.S). However, President Petar Stoyanov vetoed those levels of fines, on the grounds that they were too high in the light of journalists' salaries. As a result, insult and defamation remain criminal offences but are no longer punishable by prison sentences.

### **Civil Code**

Under civil law, both natural and legal persons may institute proceedings for insult, slander and libel. Natural persons can claim moral as well as material damages; legal persons can only claim material damages. The defendant bears the burden of proof on the issue of truth.

## **Croatia**

In Article 35, the **Constitution** of the Republic of Croatia explicitly guarantees to everyone respect for and the legal protection of their personal and family life (i.e. the privacy), dignity, reputation and honour.

The violation of those personal values is penalised both as a *criminal offence* and as a *civil-law injury (tort)*. In other words, every person, whose reputation has been violated by a piece of public information, can bring a *private criminal law suit*, pursuant to the Criminal Law, against the author of that information, because of the alleged defamation (libel or insult), or/and a *civil law suit*, pursuant to the Law on Public Information, against the newspaper publisher who published defamatory information, for the purpose of receiving a compensation for the non-material or/and material damage due to the suffered mental anguish (emotional distress) and fear caused by the violation of his/her reputation. In that respect, all citizens are equal before the law.

### **Criminal Code**

A private *criminal law suit* for alleged violation of reputation can be brought against the author of the defamatory information not only by natural persons (individuals), but also by legal persons (business enterprises, trade unions, political parties, various citizens' associations), even by bodies which do not have the status of legal persons (the so-called *ius standi in iudicio*), like the Government or Ministries.

### **Civil Code**

However, in *civil* cases, the financial compensation for a *non-material* damages can be awarded only to natural persons, and not to legal persons. The reason is that, in the Croatian legal system, the compensation of damages has a character of a fair satisfaction/compensation to an individual due to the actual mental anguish (emotional distress) and fear caused by the violation of his/her reputation, whereas legal entities, by definition, cannot suffer mental anguish and fear that would justify the awarding of such satisfaction.

Legal persons can be awarded, under certain legal assumptions, only a compensation for actually suffered and established *material* damages caused by published information (which is extremely difficult to prove; therefore such suits are very rare and, as a rule, unsuccessful).

Pursuant to the Law on Public Information, a civil lawsuit for material and non-material damages can be brought only against the publisher of the newspaper (media) that published the information concerned (which, as a rule, is a legal entity – a company), and not directly against the author (journalist or editor) of the published information. On the other hand, according to the Law, the publisher who, pursuant to the court judgment, paid a compensation for damages can request from the author of the information a return of the paid amount, provided that the publisher proves that the author caused the damage intentionally or by a gross negligence (so far, no such case has ever been registered).

## Cyprus

### **Criminal Code**

Section 50 (1) of the Criminal Code (CAP.154 as amended), makes it a criminal offence punishable with imprisonment for a term not exceeding two years or with a fine not exceeding five hundred pounds (or with both), for any person to publish false news or information which may impair public order, or the confidence of the public in the State or its organs, or to cause fear or concern to the public, or to disturb in any way public peace and order. It is a defence, however, for the person accused to satisfy the Court that the publication was made in good faith and on the basis of facts justifying such publication. No criminal proceedings can be instituted under this section without written consent by the Attorney General of the Republic, a constitutionally independent Officer, invested with authority under Article 113 of the Constitution, to exercise control and co-ordination over the machinery of administration of criminal justice in the public interest.

Other relevant provisions in the Criminal Code are those of sections 46A, 47 and 48. Section 46A makes it an offence punishable with a term of imprisonment not exceeding three years to publish orally or in writing, or by any other means, anything which tends to insult or offend the honour of the Head of State. Section 47, taken in conjunction with section 48 (which defines the term “seditious intention”), makes it an offence punishable with a term of imprisonment not exceeding five years to publish any words or document, or make a visible representation, with a seditious intention, that is with an intention to bring into hatred or contempt, or to incite to sedition against the Government of the Republic, or with an intention to bring about a change in the sovereignty of the Republic.

## Czech Republic\*

### **Criminal Code**

Art. 199: “Spreading false, alarming information,” is punishable by up to one year imprisonment or a fine.

Art. 206: “Defamation, which consists of communicating false information that damages a person’s standing within the community or causes other serious harm,” is punishable by up to one year imprisonment. If the defamation is communicated through the mass media, the punishment is up to two years imprisonment. A provision of the Czech Criminal Code making defamation of the President punishable by up to two years in prison was repealed as from January 1998.

A similar provision criminalising defamation of the Government, Parliament and Constitutional Court was struck down by the Constitutional Court in 1994.

## **Denmark**

### **Criminal Code**

Section 267 of the Danish Criminal Code concerns libel and provides sanctions for the violation of the personal honour of another citizen by offensive words or conduct or by making or spreading allegations of an act likely to discredit him in the esteem of his fellow citizens. Such acts are sanctioned with a fine or imprisonment not exceeding 4 months. The punishment may be increased to imprisonment for a term not exceeding 6 months. Proceedings are initiated by the victim.

Section 121 provides that a person who assaults a public servant with insults, abusive language or other offensive words or gestures is liable to a fine or a maximum sentence of 6 months imprisonment. It is the public prosecutor who initiates the proceedings.

Furthermore, section 266 b provides that “any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion or sexual inclination shall be liable to a fine or to imprisonment for a term not exceeding two years”. In 1995, this provision was amended, making it a mandatory aggravating circumstance if the dissemination of racist or other views is considered to be propaganda, cf. section 266 b (2).

## **Estonia**

### **Criminal Code**

#### § 129. Defamation

(1) The dissemination, knowingly, of false or embarrassing unfounded information about another person is punishable by a fine.

(2) Defamation in print or by other means accessible by several persons, or in a petition or anonymous letter submitted to a state, non-profit or other organisation, is punishable by a fine or detention.

#### § 130. Insult

The degradation of the honour or dignity of another person in an improper manner is punishable by a fine or detention.

#### § 183. Defamation of representative of state authority or other person protecting public order

Defaming or insulting a representative of state authority or any other person protecting public order, if committed in connection with the performance of his or her official duties by such person, is punishable by a fine or detention.

#### § 194<sup>2</sup>. Defamation of national flag or national coat of arms

A person who tears down, damages, profanes or otherwise defames the national flag, the flag or another state, national coat of arms, shall be punished by a fine or detention or up to one year of imprisonment.



**Civil Code**

## § 23. Defamation

(1) A person has the right to demand the termination of defamation, the refutation of defamatory information concerning this person and compensation for moral and proprietary damage caused by the defamation by a court proceeding, unless the defamer proves the accuracy of the information.

(2) If inaccurate information is disseminated through a mass medium, it shall be refuted in the same mass medium.

(3) A document which contains inaccurate information shall be replaced.

(4) If defamatory information is disseminated in a manner different from that provided for in subsections (2) and (3), a court shall specify the manner in which the information is to be refuted.

## § 42. Defamation

(1) A legal person has the right to demand the termination of defamation, the refutation of defamatory information concerning this person and compensation for proprietary damage caused by the defamation by a court proceeding, unless the defamer proves the accuracy of the information.

(2) Defamatory information shall be refuted pursuant to the procedure provided for in subsections 23 (2)-(4).

(3) The provisions of subsection (1) do not apply to the state or local governments or in other cases prescribed by law.

**Finland****Criminal Code**

In Finland, the libel of State authorities and symbols as such has not been established as a criminal offence. In the case of State authorities, libel constitutes criminal defamation provided that the insult can be considered against certain persons (public servants). Under section 8 of the Act concerning the Finnish flag (Statutes of Finland 380/1978), a person who ruins or disrespectfully uses the Finnish flag will be sentenced to a fine.

Criticism against politicians and public servants is only punishable subject to certain conditions. Under chapter 24, section 9, subsection 1, paragraph 1 of the Criminal Code (Statutes of Finland 531/2000), a person who spreads false information or a false insinuation about another person so that the act is conducive to causing damage or suffering to that person, or subjecting that person to contempt, shall be sentenced for defamation. Under paragraph 2, a person who makes a derogatory comment on another person otherwise than in a manner referred to in subparagraph 1 shall also be sentenced for defamation. Under section 9, subsection 2, criticism that is directed at a person's activities in politics, business, public office, public position, science, art or in a comparable public position and that does not obviously overstep the limits of correctness shall not constitute defamation under paragraph 2 of section 1.

A person who spreads information, an insinuation or an image of the private life of another person, so that the act is conducive to causing that person damage or suffering, or subjecting that person to contempt, shall also be sentenced for invasion of the personal reputation under section 8 of chapter 24 of the Criminal Code (Statutes of Finland 531/2000).

Under subsection 2 of the section, the spreading of information, an insinuation or an image of the private life of a person in politics, business, public office or public position, or in a comparable position, shall not constitute an invasion of personal reputation, if it may affect the evaluation of that person's activities in the position in question and if it is necessary for the purposes of dealing with a matter of importance to society.

### **France\***

In French law, defamation is both a tort (a civil wrong) and a criminal offence. It consists of any allegation of fact which constitutes an attack on the honour or reputation of a person (Article 29 of the 1881 Press Act). If found guilty, the editor, publisher or author may be ordered to pay a criminal fine to the State in addition to civil damages to the aggrieved party.

#### **Loi du 29 juillet 1881 sur la liberté de la presse**

*Chapitre 4 : Des crimes et délits commis par la voie de la presse ou par tout autre moyen de publication*

##### *Article 23*

*Seront punis comme complices d'une action qualifiée crime ou délit ceux qui, soit par des discours, cris ou menaces proférés dans des lieux ou réunions publiques, soit par des écrits, imprimés, dessins, gravures, peintures, emblèmes, images ou tout autre support de l'écrit, de la parole ou de l'image vendus ou distribués, mis en vente ou exposés dans des lieux ou réunions publics, soit par des placards ou des affiches exposés au regard du public, soit par tout moyen de communication audiovisuelle, auront directement provoqué l'auteur ou les auteurs à commettre ladite action, si la provocation a été suivie d'effet.*

*Defence.* The two main defences are truth and good faith. A journalist may establish such a defence if he or she can prove good faith, i.e. he or she proceeded with care, checked the facts, tried to contact the interested person, etc.

*Persons performing a public function.* Ministers, members of Parliament, civil servants and any public agent or person performing a public duty, even on a temporary basis (such as a member of a jury or a witness giving evidence in court), must meet a higher standard of proof in prosecuting a defamation claim. Political leaders who do not fall in one of the above categories also tend to be required to meet a higher standard of proof in prosecuting defamation claims regarding their public functions.

*Invasion of privacy.* Initially established by the case-law of the civil courts during the 1960s, privacy is now a right under Article 9 of the French Civil Code. Neither the Civil Code nor the case-law give a comprehensive definition. Invasion of privacy is only a tort, unlike defamation (which may also be a criminal offence). Neither truth, nor good faith, nor the public interest provide for a defence.

Courts rarely order the seizure of a book or the complete edition of a periodical in a summary proceeding in advance of a full determination on the merits, in view of the significant infringement of press freedom that such a measure would constitute. They have, however, ordered such measures in extreme cases of deliberate and outrageous violation of privacy, when summary seizure offered the only adequate remedy.

*Insults to government institutions or officials.* Libel against any State institution (such as the courts, the army and public administration at large) is a criminal offence. In addition, libel against a minister, a Member of Parliament, or any civil servant or public agent concerning his or her public duties or capacity is a separate offence.

*Article 30*

*(Modifié par Ordonnance 2000-916 2000-09-19 art. 3 JORF 22 septembre 2000 en vigueur le 1er janvier 2002.)*

*La diffamation commise par l'un des moyens énoncés en l'article 23 envers les cours, les tribunaux, les armées de terre, de mer ou de l'air, les corps constitués et les administrations publiques, sera punie d'une amende de 45000 euros.*

Insult to the President of the Republic is a distinct offence.

*Article 26*

*(Modifié par Ordonnance 2000-916 2000-09-19 art.3 JORF 22 septembre 2000 en vigueur le 1<sup>er</sup> janvier 2002)*

*L'offense au Président de la République par l'un des moyens énoncés dans l'article 23 est punie d'une amende de 45000 euros.*

*Les peines prévues à l'alinéa précédent sont applicables à l'offense à la personne qui exerce tout ou partie des prérogatives du Président de la République.*

Two other provisions exist: insult to foreign heads of states and ministers of foreign affairs, and outrage to foreign ambassadors or diplomatic agents.

*Article 36*

*(Modifié par Ordonnance 2000-916 2000-09-19 art. 3 JORF 22 septembre 2000 en vigueur le 1er janvier 2002.)*

*L'offense commise publiquement envers les chefs d'Etats étrangers, les chefs de gouvernements étrangers et les ministres des affaires étrangères d'un gouvernement étranger sera punie d'une amende de 45000 euros.*

## **Georgia**

### **Criminal Code**

Article 148. Libel

Libel, shall be punishable by a fine or by socially corrective labour extending from one hundred to two hundred hours or by corrective labour for up to one year in length.

### **Civil Code**

Article 18

#### *Personal Non-property rights*

1. A person whose right to a name is contested, or whose interests are impaired through the unauthorised use of his name, shall be entitled to demand that the wrongdoer cease or refrain from such action.

2. A person is entitled to demand in court the retraction of information that defames his/her honour, dignity, privacy, personal inviolability or business reputation unless the person who has disseminated such information can prove that it corresponds to the true state of affairs. The same rule applies to the incomplete dissemination of facts, if such dissemination defames the honour, dignity or business reputation of a person.

3. If information defaming the honour, dignity, business reputation or private life of a person has been disseminated in the mass media, then it must be retracted in the same media. If such information is contained in a document issued by an organisation, then this document must be corrected and the parties concerned must be informed of the correction.

4. A person whose honour and dignity has been defamed by information disseminated in the mass media shall be entitled to disseminate information in answer to the defamation through the same media of information.

5. A person may likewise exercise the rights described in paragraphs (1) and (2) of this article when his/her image (photograph, film, video etc.) has been disseminated without his consent. The consent of the person is not required when photo-taking (video recording etc.) is in connection with his public notoriety, the office he holds, the requirements of justice or law enforcement, scientific, educational or cultural purposes, or when the photo-taking (video recording etc.) has occurred in public circumstances, or when the person has received remuneration for posing.

6. The protection of the good (i.e. human values such as honour, dignity and privacy) referred to in this article shall be exercised regardless of the culpability of the wrongdoer. If the violation has been caused by culpable action, a person may claim damages (compensation for harm). Damages may be claimed in the form of the profit that accrued to the wrongdoer. In the case of culpable violation, the injured person may also claim compensation for non-property (moral) damage. Moral damages may be recovered independently from the recovery of property damages.

#### Article 19

##### *Protection of Personal Rights after Death*

The rights referred to in Article 18 may also be exercised by a person who, although not the bearer of the name or the right to personal dignity himself, nevertheless has an interest (in it) deserving protection. He/She may exercise the right to demand such protection of the name and dignity (of the person) which determines the essence of the person and continues to exist as well after death. It shall not be allowed to claim compensation for property damage for defamation of the name, honour, dignity or business reputation of a person after his death.

On press and other mass media sources

#### Article 20

##### *The right of refutation and answer on information that offends/insults person or organisation*

1. A person or organisation has the right to ask editorial staff by means of/through mass media to refute an information that offended/insulted a person
2. The refutation or answer is issued in newspaper or magazine under a special heading in the same page or is broadcasted by the next/upcoming TV- radio programme in no longer than a week from the day of receipt a request. The refutation can be printed in another newspaper or magazine, if the material that has offended a person was printed in a non-permanent/disposable issue
3. If a citizen or organisation is not satisfied with the answer, he/it can apply to the Justice/law-court.

#### Article 25

##### *Spreading of false information, compromising of honour and dignity of a citizen and organisation*

For spreading false information, for intentional offend and slander/libel of citizens and organisations all responsibility is laid on the mass media being in property of the State, private or community organisation's, on their directors/managers, editors (editor in chief) and authors of the article/story that has violated the law

#### Germany\*

Defamation is both a criminal offence and a tort.

The right to one's own image, to a fair trial, to privacy, to business reputation and the right of self-determination concerning personal data are facets of human dignity protected by Article 1 of the Basic Law and the right to free development of one's personality (self-expression and autonomy) protected by Article 2. In defamation and privacy cases, the courts balance these rights against the constitutional guarantees of press freedom and the public's right to information in case of a legitimate public interest.

The most important criminal law provisions, which regulate protection of the right to personal honour, are found in §185 et seq. of the Criminal Code (Strafgesetzbuch). Protection of the right to personal honour encompasses those expressions of opinion that constitute an "insult" (Beleidung) within the meaning of §185 of the Criminal Code, because they unacceptably reduce the sense of honour as well as the public reputation and standing of the person affected. Untrue factual assertions are also included to the extent they are capable of reducing the public standing of the affected person and, therefore, constitute slander (üble Nachrede) within the meaning of §186 of the Criminal Code or, because it goes against one's better judgement, constitute "defamation" (Verleumdung) pursuant to §187 of the Criminal Code.

*Distinction between facts and opinions.* The law distinguishes between the expression of an opinion and factual allegations. The publication of an untrue fact which severely harms another's reputation is a crime if the person who published the statement knew it was false or showed malicious disregard for its truth.

*Defences.* Under both civil and criminal law, a plaintiff who accuses a press defendant of defamation or malicious falsehood must prove that the press failed to meet its duty to check the facts properly and that this failure was willful or negligent.

Even if the facts are shown to be wrong at the trial, as long as the press defendant was neither negligent nor malicious, he/she is likely to prevail because of the weight given to the public's right to information about matters of public interest.

It is a defence if the publication of an offensive or insulting statement served a legitimate interest.

*Opinions expressed in the context of a political debate are subject to particular protection.*

Highly insulting expressions of opinion are more likely to be tolerated when they were made in response to a personal attack. In the Schmid/Spiegel case, the Federal Constitutional Court held that a person (including a journalist) who makes a provocative statement must accept a "counter attack", even if it is defamatory.

*Invasion of privacy.* Several criminal laws provide an additional protection of the right to private life as protected by Articles 1 and 2 of the Basic Law. Telephone tapping and the use of bugging devices are prohibited. The disclosure of information told in confidence to such professionals as lawyers, doctors, psychologists and pharmacists is also prohibited. The Federal Law on Data Protection of 20 December 1990 protects the privacy of personal data files.

There is a special protection against the unauthorised use of photographs of individuals. According to the Law for the Protection of Copyrights in Art and Photography, pictures of a person may only be published with his or her consent. Exceptions apply, however, for photographs of public figures and people attending public gatherings. Court decisions have distinguished between "absolute" public figures, such as politicians and sportsmen, and others, such as defendants in criminal trials, who are only of public interest because of their involvement in a particular event.

*Insults to government institutions or officials.* Among the general laws which limit press freedom, there are various criminal provisions to protect the Constitution and state organs, government officials and the public order. The Criminal Code prohibits the defamation of the Federal President in public by spoken or printed words. Criminal provisions also protect the Federal and *Länder* legislatures, governments, constitutional courts and their members against public attacks. Insults to the representatives of foreign states, as well as to foreign flags and national emblems are prohibited. However, these provisions are of little importance. In practice, criticism of Federal policy and politicians, even if it is sharp and obviously unfair, is entitled to protection unless it amounts to defamation. Thus, the general law on defamation concerning politicians has tended to overtake the various specific laws on insult of government officials. Given the Federal Constitutional Court's statement that vigorous criticism of public officials is an acceptable and necessary part of democracy, it has generally overturned convictions for defamation of government officials.

## **Greece**

### **Criminal Code**

The law provides for criminal liability for insult and defamation.

Insult is punished with imprisonment of up to one year and/or with a pecuniary penalty (from GDR 50,000 to GDR 5 million, as defined in Art. 57 of the Penal Code, PC) (PC, Art. 361, Paragraph 1).

Usually the sentences do not exceed two months, or, if the defendant wants to appeal, four months – the minimum sentence necessary for the right to appeal to be enforced.

Unprovoked insult is punished with imprisonment of at least three months (PC, Art. 361A, Paragraph 1).

Defamation is punished with imprisonment of up to two months and/or by a pecuniary penalty. Aggravated defamation is punished with imprisonment of at least three months (PC, Art. 363), to which a pecuniary penalty can be added. The offender can also be punished with deprivation of his/her civil rights.

Defamation of a corporation is punished with imprisonment of up to a year or with a pecuniary penalty (PC, Art. 364, Paragraph 1), while aggravated defamation of a corporation is necessarily punished with imprisonment (PC, Art. 364, Paragraph 2).

Disparaging the memory of a deceased is punished with imprisonment of up to six months (PC, Art. 365).

The cases are always initiated following the private complaint of an injured person (PC, Art. 68, Paragraph 1)

The law provides for more severe sentences in cases of libel and defamation of public officials than of ordinary citizens. Libel and defamation of the President of the Republic and to the Parliament are punished with imprisonment of not less than three months (PC, Art. 157, Paragraph 3; PC, Art. 168, Paragraph 2). Insult to board councils of the county, municipal or community councils is punished with imprisonment for up to two years (PC, Art. 157, Paragraph 3). Libel against the Parliament and the local councils can be punished in addition by deprivation of positions (PC, Art. 157, Paragraph 4). Attacks against the honour of a Head of a foreign state are punished with imprisonment (PC, Art. 153, Paragraph 1b).

Journalists can invoke the notions of proof, good faith and public interest in their defence against charges of insult or defamation. According to the Penal Code, if defamation is based on true information that affects the public interest, defamation is not punished (PC, Art. 366, Paragraph 1), although punishment for insult is not excluded, if the intent to insult has been proven beyond reasonable doubt (PC, Art. 366, Paragraph 3).

Disapproving criticism of scientific, artistic or occupational developments, or criticism for the purpose of fulfilling lawful duties, the exercise of lawful authority or protecting a right or some other justified interest, do not constitute an unjustified act (PC, Art. 367, Paragraph 1), unless they include aggravating elements (PC, Art. 367, Paragraph 2a) or unless the intent to insult is apparent (PC, Art. 367, Paragraph 2b).

### **Civil Code**

Libel and defamation can also be dealt with in the Civil Code.

Article 920 (“Defamatory rumours”) states that one who intentionally disseminates lies that can hurt someone else is liable to fines.

In addition, Article 57 (“Right to personality”) provides that one whose personality is offended has the right to ask for the offence to be withdrawn, as well as for the promise that this would not be repeated in the future.

Article 59 (“Satisfaction for moral abuse”) provides that the court, upon request of the plaintiff, can also impose compensation or order the publication of the revocation of the offence. The obligation to compensate is prescribed also in Article 919 (“Offence to morals”) and Article 932 (“Satisfaction for moral abuse” for an unjustified act).

## **Hungary**

On June 24 1994, the Hungarian Constitutional Law Court declared unconstitutional Art. 232 of the Criminal Code, which had made publication of statements likely to damage the reputation of a public official or the honour of a public authority a criminal offence punishable by up to two years imprisonment.

Both civil and criminal liability is provided for by the Hungarian legal system for libel and defamation.

### **Criminal Code**

Libel (Article 179):

(1) The person who states or rumours a fact likely to harm the honour, or uses an expression directly referring to such a fact, about somebody, before somebody else, commits a misdemeanour, and shall be punishable with imprisonment of up to one year, public labour, or a fine.

(2) The punishment shall be imprisonment of up to two years, if the defamation is committed for a base reason or purpose, before big publicity, causing considerable harm.

“Rumouring” means the transmission of facts stated by someone else. The facts transmitted are not known by the transmitter himself. This crime can be committed by question form as well.

“An expression directly referring to a fact” means the transmission of a characteristic element of the facts from which the whole event can be deduced or reconstructed.

Defamation (Article 180):

(1) The person who, apart from the case set forth in Article 179, uses an expression which may harm the honour or commits another act of such a type, in connection with the job, performance of public mandate or in connection with the activity of public concern of the injured party, before big publicity, shall be punishable for a misdemeanour with imprisonment of up to one year, public labour in the public interest, or a fine.

(2) The officer who commits slander with assault shall be punishable in accordance with subsection (1).

Libel and defamation are punishable upon a private motion. Defamation or slander committed to the detriment of a person enjoying diplomatic or other personal immunity based on international law is punishable upon the so-called “wish” of the injured party declared through diplomatic channels.



The legal object of defamation is identical with the object of libel (human dignity, honour and social respect) and passive subjects may be the same as well. The law regards defamation less serious crime than libel. The two provisions are subsidiary in nature therefore the judge shall first determine whether the conduct complained of constitutes libel.

Similarly to libel, if the factual content of the impugned piece of criticism or expression of opinion proves to be true than the conduct shall not constitute defamation. However, defamatory statements violating human dignity may amount to defamation even in cases when the statements have formally been brought to publicity in the form of criticism.

**Impiety (Article 181)**

Whosoever outrages a dead person or his memory in a way defined under Article 179 or 180 shall commit an offence and shall be punishable with the punishment specified there.

The conduct incriminated under this Article (outraging a dead person or his memory) constitutes gross violation of honour therefore what has been said in connection with libel and defamation shall apply to this conduct as well.

**Violation of national symbols (Article 269A)**

Whosoever uses an expression outraging or humiliating the national anthem, the flag or the coat of arms of the Republic of Hungary or commits any other similar act before great publicity shall, unless a graver crime has been committed, be punishable for an offence with imprisonment of up to one year labour in the public interest or fine.

The national symbols of the Republic of Hungary are regulated under Articles 75 and 76 of the Constitution. Detailed regulation is provided under Act nr. 83 of 1995 on the national symbols and the use of terms denoting the Republic of Hungary.

In its ruling of 12/2000 (V.12) the Constitutional Court interpreted the meaning and significance of the national symbols. It held that these symbols are, on the one hand, the outer representations of the state and the sovereignty of the state and, on the other hand, they manifest the fact of belonging to the nation as a community.

This crime is of subsidiary nature which means that it can be established only in that case if no graver crime has been committed. If the conduct performed outrages the Hungarian nation and incites to hatred against the Hungarian nation it shall be determined on the basis of Article 269 governing the crime of incitement against a community.

Defamation is also regulated as petty offence under Article 138 of Act nr. 69 of 1999 on petty offences:

**Article 138**

- (1) Anyone who uses an expression suitable for impairing honour or commits another act of such a type shall be punishable for a fine amounting to 50.000 HUF
- (2) Petty offence proceedings on defamation shall be instituted only for private prosecution.

On the basis of this legal provision, the responsibility of those perpetrators shall be established who perform invective, rude and tactless conduct or make indecent gestures which do not amount to gross violation of honour, but infringe it.

### **Civil Code**

The system of civil liability is more complicated. The most likely infringement of inherent rights in connection with freedom of expression is defamation under Article 78 of Act IV of 1959 on the Civil Code: “The protection of inherent rights shall also include protection against defamation. The statement, publication, or dissemination of an injurious untrue fact pertaining to another person or a true fact with an untrue implication that pertains to another person shall be deemed defamation”. However, other inherent rights (such as human dignity, right to the individual’s likeness or recorded voice) might also be concerned. The general redress for the infringement of inherent rights is provided for by Article 84 of the Civil Code:

(1) A person whose inherent rights have been violated may have the following options under civil law, depending on the circumstances of the case:

- a) demand a court declaration of the occurrence of the infringement;
- b) demand to have the infringement discontinued and the perpetrator restrained from further infringement;
- c) demand that the perpetrator make restitution in a statement or by some other suitable means and, if necessary, that the perpetrator, at his own expense, make an appropriate public disclosure for restitution;
- d) demand the termination of the injurious situation and the restoration of the previous state by and at the expense of the perpetrator and, furthermore, to have the effects of the infringement nullified or deprived of their injurious nature;
- e) file charges for punitive damages in accordance with the liability regulations under civil law.

(2) If the amount of punitive damages that can be imposed is insufficient to mitigate the gravity of the actionable conduct, the court shall also be entitled to penalise the perpetrator by ordering him to pay a fine to be used for public purposes.

The most effective of these measures is the institution of punitive damages. The maximum sum of such damages is between one and two million Forints (4000-8000 USD), while the average is between 100 and 500 thousand Forints (400-2000 USD). There is another legal institution specially designed for infringements committed via the press. This is “publication of a correction in the press” regulated by Article 79:

(1) If a daily newspaper, a magazine (periodical), the radio, the television, or a news service publishes or disseminates false facts or distorts true facts about a person, the person affected shall be entitled to demand, in addition to other actions provided by law, the publication of an announcement to identify the false or distorted facts and indicate the true facts (rectification).

(2) The correction shall be published within eight days of receipt of the relevant demand in the case daily papers, in the next issue of a periodical or a news service in the same manner, or (also within eight days) at the same time of the day if the defamation had been broadcast over radio and television.

### **Iceland**

According to Article 234 and 235 of the **Criminal Code** from 1940, libel and insult are punishable with up to one year imprisonment. As a matter of principle, cases can only be brought by natural or legal persons who claim that they have been victims of libel or insult. An exception is provided in Article 242 for public officials, if the libel or insult concerns their conduct of public office.

In that case, the public prosecutor brings a case upon demand by the public official concerned. Prison sentences have not been handed down by the courts on the basis of these provisions for decades. The most widely used remedy is to declare “improper statements null and void”, as provided for in Article 241, and to grant damages for tort.

The defendant will generally be acquitted if he or she proves the truth of the statement. Recently, the national courts, influenced by the European Court of Human Rights case law, have also accepted good faith defence and granted special protection to value judgments.

## Italy

### **Code Pénal**

Le respect de la personne est particulièrement sauvegardé dans le système pénal par les normes qui punissent les délits de diffamation et d’injure.

Le délit d’injure (Art. 594 c.p.) consiste dans le fait d’offenser l’honneur d’une personne présente, tandis que la diffamation consiste en l’offense à la réputation d’une personne absente, dans l’éventualité où l’on communique avec plusieurs personnes (Art. 595 c.p.).

## Latvia

### **Criminal Code**

#### Section 145

##### *Disclosure of Confidential Information of Another Person*

For a person who commits intentional disclosure of personal confidential information of another person, if it has been committed by a person who pursuant to his or her position or employment must maintain the information entrusted or communicated to him or her in confidence, the applicable sentence is custodial arrest, or community service, or a fine not exceeding twenty times the minimum monthly wage.

#### Section 156

##### *Defamation*

For a person who commits intentional defamation or demeaning of the dignity of a person orally, in writing, or by acts, the applicable sentence is custodial arrest, or a fine not exceeding ten times the minimum monthly wage.

#### Section 157

##### *Bringing into Disrepute*

For a person who knowingly commits intentional distribution of fictions, knowing them to be untrue and defamatory of another person, in printed or otherwise reproduced material, or orally, if such has been done publicly (bringing into disrepute), the applicable sentence is custodial arrest, or a fine not exceeding twenty times the minimum monthly wage.

#### Section 158

##### *Defamation and Bringing into Disrepute in Mass Media*

For a person who commits intentional defamation or bringing into disrepute in mass media, the applicable sentence is deprivation of liberty for a term not exceeding one year, or custodial arrest, or community service, or a fine not exceeding thirty times the minimum monthly wage.

## Section 271

*Defamation and Injuring the Dignity of a Representative of Public Authority or Other State Official*

For a person who commits bringing into disrepute a representative of public authority, or other State official, or defamation of such persons in connection with the performance of duties imposed on them, the applicable sentence is the deprivation of liberty for a term not exceeding two years, or custodial arrest, or community service, or a fine not exceeding sixty times the minimum monthly wage.

**Civil Code***II Right to Compensation for Offences against Personal Freedom, Reputation, Dignity and Chastity of Women*

2352a. Each person has the right to bring court action for retraction of information that injures his or her reputation and dignity, if the disseminator of the information does not prove that such information is true.

If information, which injures a person's reputation and dignity, is published in the press, then where such information is not true, it shall also be retracted in the press. If information, which injures a person's reputation and dignity, is included in a document, such document shall be replaced. In other cases, a court shall determine the procedures for retraction.

If someone unlawfully injures a person's reputation and dignity orally, in writing or by acts, he or she shall provide compensation (financial compensation). A court shall determine the amount of the compensation.

*Sub-chapter 4 Exclusion from Inheritance*

428. An ascendant may exclude a descendant if the latter:

1) has perpetrated a criminal act against the life, health, liberty or honour of the testator, his or her spouse or his or her ascendant.

**Law on the press and other mass media***Chapter I General provisions**Section 7 Information not for Publication*

(...)It is prohibited to publish information that injures the honour and dignity of natural persons and legal persons or slanders them.

**Lithuania****Criminal Code**

Article 199-2 of the Criminal Code provides for liability for the desecration of state symbols. This Article establishes that desecrating state symbols is punished by imprisonment for up to two years, correctional works, or a fine.

Responsibility for offending a representative of the government or the society is established by Article 202 of the Criminal Code, which prescribes imprisonment for up to 6 months, correctional works for the same period, or a fine.

Article 202-1, establishes that offending a policeman or an assistant to a policeman is punished by imprisonment for up to six months, correctional works for up to one year, or a fine.

**Civil Code**

Compensation for property damage is laid down in the Civil Code, which provides in principle for the absolute compensation of non-property damage. Article 6.250 of the Civil Code provides that the court, in establishing the amount of non-property damage, takes due account of its consequences, the guilt of the person who caused the damage, his property status, the amount of non-property damage caused as well as other circumstances relevant to the case, including honesty, justice and prudence criteria. The amount of the compensation for non-property damage for publishing information incompatible with the reality, due to which an individual incurred losses, is estimated by the court.

**Law on the Provision of Information to the Public**

On 29 August 2000, the Law on Amending the Law on the Provision of Information to the Public of 1996 was adopted. This law provides responsibility for violations of the procedure of dissemination of public information. Article 54 states that a producer and (or) disseminator of public information who publishes information about an individual's private life without the natural person's consent, as well as the producer who publishes false information degrading the honour and dignity of the person, shall pay a compensation for moral damage to that person, in the manner set forth by law.

**Luxembourg****Loi sur la presse coordonnée**

Loi du 20 juillet 1869 sur la presse et les délits commis par les divers moyens de publication, (Mém. 1869, p. 357), modifiée par: Loi du 10 novembre 1966 (Mém. A 1966, p. 1105)

**Chapitre 1: Délits commis par la voie de la presse ou par toute autre voie de publication**

Art 1er. Indépendamment des dispositions de l'art. 60 du Code pénal, et pour tous les cas non spécialement prévus par ce Code, seront réputés complices de tout crime ou délit commis, ceux qui, soit par des discours prononcés dans un lieu public devant une réunion d'individus, soit par des placards affichés, soit par des écrits imprimés ou non et vendus ou distribués, auront provoqué directement à les commettre.

Cette disposition sera également applicable lorsque la provocation n'aura été suivie que d'une tentative de crime ou de délit, conformément aux art. 2 et 3 du Code pénal. (Articles 51, 52 et 53 nouveau).

Dans le cas où la provocation n'aura été suivie d'aucun effet, ou lorsque la tentative au délit auquel elle aura excité n'est pas réprimée par les lois pénales, l'auteur de la provocation sera puni d'une amende de 5.000 à 50.000 francs et d'un emprisonnement de huit jours à un an, sans que toutefois la peine puisse excéder celle du délit même.

Art. 3. Quiconque, par un des moyens indiqués à l'art. 1er, aura méchamment attaqué, soit l'autorité constitutionnelle du Roi Grand-Duc, soit l'inviolabilité de sa personne, soit les droits constitutionnels de sa dynastie, soit les droits ou l'autorité de la Chambre des députés, sera puni d'un emprisonnement de trois mois à trois ans et d'une amende de 10.000 à 150.000 francs.

Art. 10. Les délits d'injure ou de calomnie, commis par la voie de la presse, ne pourront être poursuivis que sur la plainte de la partie calomniée ou injuriée. Toutefois, les délits d'offense, d'injure ou de calomnie envers le Roi Grand-Duc, ou les membres de sa famille, envers les souverains ou chefs de Gouvernement étrangers, envers les corps ou individus dépositaires ou agents de l'autorité publique, en leur qualité ou à raison de leurs fonctions, pourront être poursuivis d'office.

Dans le cas où les poursuites auront été commencées sur la plainte de la partie lésée, celle-ci pourra les arrêter par son désistement.

## **Malta**

### **Press Act 1996**

Part 2 press offences:

#### 3. Means whereby offences under this Act are committed

The offences mentioned in this Part of this Act are committed by means of the publication or distribution in Malta of printed matter, from whatsoever place such matter may originate, or by means of any broadcast.

#### 5. Imputation of ulterior motives to acts of President of Malta

(1) Whosoever, by any means mentioned in section 3 of this Act, shall impute ulterior motives to the acts of the President of Malta or shall insult, revile or bring into hatred or contempt or excite disaffection against, the person of the President of Malta, shall be liable on conviction to imprisonment for a term not exceeding three months and to a fine (multa) not exceeding two hundred liri.

#### 11. Defamatory libel

Save as otherwise provided in this Act, whosoever shall, by any means mentioned in section 3 of this Act, libel any person, shall be liable on conviction:

- a. if the libel contains specific imputations against such person tending to injure his character and reputation, or to expose him to public ridicule or contempt, to imprisonment for a term not exceeding three months or to a fine (multa) or to both such imprisonment and fine;
- b. in any other case, to imprisonment for a term not exceeding one month or to a fine.

#### 12. Plea of justification

(1) In any action for a defamatory libel under section 11 of this act, the truth of the matters charged may be enquired into if the accused, in the preliminary stage of the proceedings, assumes full responsibility for the alleged libel and declares in his defence that he wishes to prove the truth of the facts attributed by him to the aggrieved party:

Provided that the truth of the matters charged may be enquired into only if the person aggrieved:

- a. is a public officer or servant and the facts attributed to him refer to the exercise of his functions; or
- b. is a candidate for a public office and the facts attributed to him refer to his honesty, ability or competency to fill that office; or

- c. habitually exercises a profession, an art or a trade, and the facts attributed to him refer to the exercise of such profession, art or trade; or
- d. takes an active part in politics and the facts attributed to him refer to his so taking part in politics; or
- e. occupies a position of trust in a matter of general public interest;

Provided further that the truth of the matters charged may not be enquired into if such matters refer to the domestic life of the aggrieved party.

(2) Where the truth of the matters charged is enquired into in accordance with the foregoing provisions of this section:

(a) if the truth of the matters charged is substantially proved, the defendant shall not be liable to punishment if the court is satisfied that the proof of the truth has been for the public benefit and he shall be entitled to recover from the complainant or plaintiff the costs sustained by him in any criminal or civil proceedings:

Provided that the proof of the truth of the matters charged shall not exempt the defendant from punishment for any insult, imputation or allegation which the court shall consider to have been unnecessary in attributing to the person aggrieved the facts the proof of the truth whereof shall have been allowed;

(b) if the truth of the matters charged is not substantially proved, the accused shall be liable to imprisonment for a term not exceeding six months or to a fine (multa) not exceeding five hundred liri or to both such imprisonment and fine.

### **Moldova**

On 24 April 1996, the Parliament of Moldova repealed Art. 203/6 of the Criminal Code, which had provided that insult or defamation of the President of the Republic or Chairman of the Parliament was a criminal offence, punishable by a fine or up to five years imprisonment. The action was taken at the request of the President and Chairman. However, Art. 4 of the 1994 Press Law still prohibits the publication of “materials that contain disrespect or defamation of the State and its people” and “materials that harms the honour and dignity of a person.”

#### **Criminal Code**

##### Article 117 Slander/Calumny

Slander in printing or in any other work multiplied in a different way, in an anonymous letter is punished by a three-year imprisonment with up to two years of reformatory works, or by a fine in amount of up to fifty minimal salaries.

Slander that caused serious consequence or connected with an accusation in committing a serious crime or crime against the state is punished with an imprisonment for a term from six months to five years.

##### Article 133<sup>1</sup> *Spreading wittingly false information about the candidates.*

Spreading wittingly false information about one of the candidates is punished by an imprisonment of up to two years or by reformatory works for the same period or by a fine in amount of fifty minimal salaries.

Article 205<sup>2</sup> *Calumny on the representative of legal bodies.*

The calumny on an employee of legal bodies, i.e. actions connected with spreading wittingly false and disgraceful information related to his professional activity, also publishing in press or multiplying in a different way articles, using mass media, writing anonymous letters, – is punished by deprivation of freedom for a term of three years, or by reformatory works for a term of two years, or by a fine in amount of thirty minimal salaries.

**Civil Code**

Article 7. *Defence of honour and dignity*

Any natural or legal person has the right to demand through a court of law the retraction of information which was damaging to his/her honour and dignity, if the person that has disseminated that information fails to prove that it is true.

If such information has been disseminated through a news media organisation, the court of law obliges the editorial board of that organisation to publish, no later than 15 days after the court decision enters into effect, a retraction in the same section, on the same page, in the same programme or programme series.

If such information has been published in a document issued by an institution, the court of law requires from that institution the replacement of that document.

Article 7/1. *Recovering moral damages*

Moral damages caused to a person as a result of the dissemination of information that is not true and that is damaging to his/her honour and dignity, are recovered by the plaintiff from the natural or legal person that has disseminated that information.

The amount of compensation is established by a court of law, separately in every case, from seventy five to two hundred minimal salaries – if the information has been disseminated by a legal person, and from ten to one hundred minimal salaries – if it has been disseminated by a natural person.

Timely publication of apologies or of a retraction for the information specified in paragraph 1 of the present Article, before the court decision is pronounced, provides a basis for the reduction of the compensation amount or for the exoneration from its payment.

**Administrative Code**

Article 47<sup>2</sup> *Slander/ Calumny*

Slander means spreading wittingly false and disgraceful information about any person and involves a penalty in a form of a fine of ten to twenty five minimal salaries, or and administrative arrest for term of thirty days.

Article 47<sup>3</sup> *Insult*

Insult or wittingly humiliation of person's honour and dignity expresses in oral or written form or by an action involves a fine of seven to fifteen minimal salaries or by an administrative arrest for a term of fifteen days.

Insult in press or in any other work multiplied by other means, as well as insult by a person who was already subjected to administrative penalty for the same infringement is punished by a fine in amount of from ten to twenty five minimal salaries or by an administrative arrest for a term of thirty days.



**Press law**

## Chapter 1:

Article 4. *The Freedom of Expression and the Limitation of Publicity*

(1) Periodicals and press agencies can publish, according to their own appreciation, any kind of materials and information, except:

- a) materials that contains disrespect and defamation against the state and people, urge on war of aggression, national, racial or religious hatred, inciting discrimination, territorial separatism, public violence, as well as other manifestations that violate the present constitutional regime;
- b) materials that disparage the honour and respect for a person and are not true or the materials that do not disparage the honour and respect for a person, but are not true, as well as the materials that contradict the present legislation and the general principles of international conventions concerning the rights of human beings.

**Broadcasting Law**

## Article 40

(2) The person, who considers that his/her rights or his/her legal, moral or material interests have been infringed by an audio-visual company, has the right to claim, in compliance with the legislation, payment for damages, adequate correction, and has the right of reply.

(3) The correction and the reply will be announced, in the same way the infringement took place, without any comment.

(4) The responsibility for the reply and correction announcement lies with the audio-visual company that is responsible for the damage incurred.

**The Netherlands\***

Defamation is both a criminal offence and a tort. Journalists are rarely charged with criminal defamation. Such a charge may only be brought by a private party filing a complaint with the prosecutor, who then has the discretion to dismiss frivolous complaints.

*Defence.* Journalists do not need to prove the truth of their accusations; it is sufficient that they have assumed the accuracy of their statements in good faith and that they made them in the public's interest.

*Public figures.* Public figures, including politicians, are often expected to accept more criticism than private persons. They are, however, protected against rash accusations. The concept of "public figure" is applied by both the courts and the Press Council.

*Invasion of privacy.* The right to privacy is guaranteed by the Constitution. It is also protected by the Civil Code; invasion of privacy is a tort. Aggressive ways of gathering information may be curbed by some provisions of the Criminal Code. Tapping of phone calls and the following of persons against their will are penalised.

In relation to the invasion of the privacy of public figures, the courts have stated that "persons with some public renown" must accept greater infringements than private persons, and the more important a public figure and the information to be exposed is, the greater is the degree of acceptable scrutiny. The private life of a public figure, however, is not to be sacrificed completely.

The extent to which a person voluntarily co-operates with a journalist is considered when a court examines an alleged infringement, but the lack of consent to publish does not automatically lead to finding illegal behaviour. Courts generally prefer to give greater weight to the role of the press as a public watchdog. In one case (Supreme Court, 4 March 1988) a photographer from a gossip magazine followed the children of Princess Irene everywhere and took pictures constantly. The Supreme Court noted that on the one hand the children had to accept that they were of legitimate interest to the public, and on the other hand they personally had not done anything to draw attention to themselves and that the gossip magazine was not interested in any serious issues. The court stressed the importance of balancing competing interests and issued a declaration finding that the children's privacy interests had indeed been violated, but declined to order the magazine to pay any damages.

*Insults to government institutions or officials.* The Criminal Code penalises the "deliberate insult" of the King or Queen or other members of the Royal Family as well as the insulting behaviour toward the friend of a friendly nation or ambassadors of such nations, while that person is staying in the Netherlands in an official capacity. However, there have been no recent cases concerning the press under any of these charges.

## Norway

The Articles of the **General Civil Penal Code** which apply to the press include provisions prohibiting:

*Defamation (including libel):* Even if a statement is true, it may be punishable if the court finds that it was made without respectable intent or was otherwise improper. Sentences can be severe: in one case a newspaper was obliged to pay NOK 6 million in damages, fines and legal costs.

*Insults to government institutions or officials:* Although this provision has not been applied for a great many years, it has not been repealed.

### **General Civil Penal Code**

#### Chapter 23. Defamation

§ 246. Any person who by word or deed unlawfully defames another person, or who is accessory thereto, shall be liable to fines or imprisonment for a term not exceeding six months.

§ 247. Any person, who by word or deed behaves in a manner that is likely to harm another person's good name and reputation or to expose him to hatred, contempt, or loss of the confidence necessary for his position or business, or who is accessory thereto, shall be liable to fines or imprisonment for a term not exceeding one year. If the defamation is committed in print or in broadcasting or otherwise under especially aggravating circumstances, imprisonment for a term not exceeding two years may be imposed.

These provisions generally apply without regard to the position of the aggrieved person. The Norwegian Supreme Court has ruled that the right to freedom of expression is particularly important where public officials are concerned, and has stressed the importance of the mass media focusing on possible abuses of public authority and other unlawful acts committed by persons exercising such authority (Supreme Court Report 1999 p. 1541, 1995 p. 1127 and 1993 p. 537). The same principles have been applied when the aggrieved person is a politician, cf. Supreme Court Report 1990 p. 257.

§ 248. If an offender under section 247 has acted against his better judgment, he shall be liable to imprisonment for a term not exceeding three years.

Under especially extenuating circumstances, fines may be imposed.

§ 249.

1. No penalty pursuant to sections 246 and 247 shall be imposed if the allegation is proved to be true.
2. Even if the truth is proved as stated in subsection 1, the allegation is criminal if it is made without any respectable reason for doing so, or if it is otherwise unwarranted because of the form or manner in which it is made or for other reasons.
3. No penalty pursuant to sections 246 and 247 shall be on any person who is under a duty or obligation to express his opinion or who has expressed his opinion in legitimately taking care of his own or another's interests if it is established that he has shown proper care in all respects.
4. Evidence of the truth of an allegation may not be given
  - a) for a criminal act of which the accused has been acquitted by a final Norwegian or foreign judgment,
  - b) if the court unanimously finds that the allegation is undoubtedly unwarranted regardless of its truth and that refusal to admit such evidence is desirable in the interests of the aggrieved person. Admission of such evidence must never be refused if the prosecuting authority or the plaintiff has indicated in advance that a penalty pursuant to section 248 will be demanded or that only civil legal claims will be pursued.
5. When evidence of the truth of an allegation is not admitted, evidence concerning whether the person indicted (the defendant) believed in or had reason to believe in the truth of the allegation is also inadmissible.

§ 250. If the defamation is provoked by improper conduct on the part of the aggrieved person himself, or retaliated with bodily assault or defamation, any penalty may be waived.

§ 251. Felonies dealt with in this chapter shall be subject to public prosecution only when the aggrieved person so requests and it is so required in the public interest. The prosecution may be limited to the submission of a demand that the defamatory statement be declared null and void (cf. section 253).

Public authorities may, however, without a request from any aggrieved person prosecute a defamatory statement that is directed against an indefinite group or a large number of persons if it is so required in the public interest.

The same applies when the defamation is committed against any person during the performance of a public service or in connection with any public service, or when any person who is or was at the time in question a public servant is accused of an act or matter which might make him liable to a penalty or loss of office.

§ 252. The acts that are defined as criminal in sections 247 and 248 are also punishable when committed against the memory of a deceased person. The penalty shall, however, in the cases referred to in section 247 be reduced to fines and in the cases referred to in section 248 to fines or imprisonment for a term not exceeding three months.

The spouse, parents, children, siblings, and heirs of the deceased person are entitled to request and institute a prosecution.

§ 253.

1. When evidence of the truth of an allegation is admissible and such evidence has not been produced, the aggrieved person may demand that the allegation be declared null and void unless it is otherwise provided by statute.
2. A claim that the allegation be declared null and void shall be summarily dismissed when the person who has made the allegation withdraws it before the main hearing in a manner that the court finds satisfactory to the aggrieved person.
3. A claim that the allegation be declared null and void shall also be summarily dismissed:
  - a) when the allegation is made in a judgment, order, judicial decision or other judicial act,
  - b) when the allegation is made by a witness during a statement in a court sitting or to the police or the prosecution authority, or by a party, legal representative, prosecutor, defence counsel, appointed expert or social inquirer or by an official employed by the prosecuting authority or the police during legal proceedings or investigation. In these cases the claim that the allegation be declared null and void shall, nevertheless, not be summarily dismissed when the court finds that the aggrieved person should have the truth of the allegation tried in declaration proceedings against the defendant or that the statement falls outside the limits of the case.
  - c) when the allegation is made in a written statement from the Storting's ombudsman for the public administration.
4. When a penalty for the allegation has been demanded, a claim that a statement be declared null and void cannot be summarily dismissed pursuant to subsection 2 or 3 unless the demand for a penalty is summarily dismissed or rejected.

§ 254. Liability for any defamation committed in a magazine or periodical printed in the realm shall not extend to any person who has only taken part in the technical production or distribution of the publication. The same applies to broadcasting.

The two following provisions from the General Civil Penal Code concern defamatory statements against the King and the royal family, however they are dormant.

§ 101. Any person who commits violence or any other assault against the King or the Regent, or is accessory thereto, shall be liable to imprisonment for a term of not less than two years. If serious injury to body or health is caused or attempted, imprisonment for a term not exceeding 21 years may be imposed.

Any person who defames the King or the Regent shall be liable to detention or imprisonment for a term not exceeding five years.

§ 102. If any felony mentioned in chapters 19,20,21,22 or 23 is committed against any member of the royal family, the custodial penalty prescribed for such felony may be doubled and imprisonment for a term not exceeding 21 years may be imposed if the usual penalty is as high as eight years' imprisonment.

## **Poland**

### **Criminal Code**

Art. 135.2. Whoever publicly insults the President of Republic of Poland in public, shall be subject to imprisonment for up to 3 years.

## Art. 137

Paragraph 1 penalises public defamation, destroying, damaging or removal of an emblem, banner, standard, flag, ensign or other symbol of the State and provides for that offence a fine, restriction of liberty or deprivation of liberty for up to one year.

Paragraph 2 penalises the same behaviours as indicated in paragraph 1 but these behaviours must be directed towards emblems and symbols of other country publicly displayed by a mission of this State or upon an order of the Polish authority and provides for this offence a fine, restriction of liberty or deprivation of liberty for up to one year.

## Art. 226

Paragraph 1 penalises defamation of a public official or a person called upon to assist him, in the course of and in connection with the performance of official duties and provides a fine, restriction of liberty or deprivation of liberty for up to one year for this offence.

Paragraph 3 penalises public defamation or humiliation of the constitutional authority of the Republic of Poland and provides a fine, restriction of liberty or deprivation of liberty for up to two years for this offence.

Art. 236: “Insulting a public official or one assisting a public official in the course of and in connection with the performance of official duties,” shall be punishable by up to two years imprisonment or a fine.

Art. 270: “Publicly insulting, ridiculing and deriding the Polish nation, the Polish Republic, its political system or its principal organs,” shall be punishable by six months to eight years imprisonment.

Art. 273: If the acts prohibited in Art. 270 are committed in print or through the mass media, the punishment is one to ten years imprisonment.

What is significant for perpetration of the offence of insult is enough to utter words that the judge considers insulting; of no importance, instead, are any further social effects related to perception of such pronouncement and to its objective results.

The Penal Code provides for criminal responsibility for defamation, which is an offence prosecuted upon motion of the injured person, although the prosecutor may join the proceedings if an important social interest so requires (*Article 212.1. Whoever accuses another person, a group of persons, an institution, a legal person or an organisational unit without legal personality, of such conduct or characteristics as may degrade them in public opinion, or expose them to the loss of confidence necessary for a given position, occupation, or type of activity, shall be subject to a fine, limitation of liberty, or imprisonment for up to 1 year.*) The penalty is more severe if the offence has been committed through the media (*Article 212.2*)

## **Romania**

Defamation (including insulting opinions) is a criminal offence. Civil law suits can also be brought against journalists. In practice, preference is given to criminal proceedings where civil damages can also be claimed.

### **Constitution**

Art. 30: “6. Freedom of expression shall not be prejudicial to the dignity, honour, privacy of person, and the right to one’s own image. 7. Any defamation of the country and the nation, any instigation to a war of aggression, to national, racial, class, or religious hatred, any incitement to discrimination, territorial separatism, or public violence, as well as any obscene conduct contrary to morality shall be prohibited by law.”

### **Criminal Code**

The Government of Romania adopted, on 23 May 2002, the Emergency Ordinance nr. 58/2002 on the amendment and completion of some provisions of the Criminal Code regarding crimes against dignity and crimes against authority.

Art. 205: “The damage brought to the honour or reputation of a person, through words, gestures or any other means, or by exposure to contempt, shall be fined.”

The insult is sanctioned, according to the Ordinance, only by fine, the punishment with imprisonment being eliminated.

Art. 206: “The public statement or imputation, made by any means, of a certain deed regarding a person, that if it were true would expose that person to a criminal, administrative or disciplinary sanction, or to public contempt shall be punished with imprisonment from two months to one year or shall be fined.”

According to the Ordinance, the punishment with imprisonment, previously stipulated from three months to three years, is now from two months to two years.

Art. 207: Truth is a defence in an insult or calumny case “only if the statement or accusation was made to defend a legitimate interest.”

The Article applies equally to oral and written expression. Criminal proceedings for libel are initiated by the complainant directly, without prosecutorial action.

The “truth proof” is “admissible only if the statement or accusation was made to defend a legitimate interest”. As clearly specified in the text, the “proof of truth” covers both facts (“libel”) and opinions (“insult”). The “legitimate interest” requirement of Romanian law refers to the personal interest of the author of the statement. Neither the good faith of the journalist nor the public interest can be brought into evidence in insult and libel cases.

Art. 236: “Manifestations of any kind expressing contempt for the insignia of the Romanian state,” shall be punishable by six months to six years imprisonment. “Manifestations expressing contempt for the emblems or insignia used by the authorities,” shall be punishable by three months to one year imprisonment or a fine.

Art. 236. 1: “Public defamation by any means of the Romanian country or nation,” is punishable by one to five years imprisonment.

According to the Ordinance, the Article 238 concerning the offence of the authority was abrogated.

Art. 239: “The insult or calumny committed directly or by direct communication against a public official representing the state authority, during the exercise of his/her duties or for deeds performed in the exercise of his/her duties, shall be punished with imprisonment from three months to three years.

The threat committed directly or by direct communication against a public official representing the state authority, during the exercise of his/her duties or of deeds performed in the exercise of his/her duties, shall be punished with imprisonment from three months to four years.

The hitting or any act of violence, as well as the corporal injuries against the persons stipulated at paragraph 1, during the exercise of his/her duties or for deeds performed in the exercise of his/her duties, shall be punished with imprisonment from six months to seven years, and if a serious corporal injuries has resulted, the punishment shall be the imprisonment from three to twelve years.

If the deeds stipulated at the previous articles are performed against a magistrate, policeman or gendarme or other military, the special maximum of the punishment shall be increased with three years.”

For the insult and libel committed against a public official representing the state authority, during the exercise of his/her duties or for deeds performed in the exercise of his/her duties, the punishment with imprisonment was set from three months to three years, being previously set for three months to four years.

### **Law on Radio and Television Broadcasting (1992)**

Art. 2: (1) Prohibits broadcasts that are prejudicial to an individual’s “dignity, honour, private life or public image.” (2) Prohibits “defamation of the country and of the nation, instigation to a war of aggression, national, racial, class or religious hatred, incitement to discrimination, territorial separatism, or public violence.”

Art. 39: Violations of Art. 2 (1) are punishable by up to five years imprisonment and of Art. 2 (2) by up to seven years imprisonment.

*Invasion of Privacy.* Privacy is guaranteed by the 1991 Constitution. Private tapping and the violation of correspondence are criminal offences. Taking photographs is absolutely free, since it is not regulated by law.

## **Russian Federation**

### **Constitution**

Article 23:

1) Each person has the right to the inviolability of his private life, individual and family privacy, and defence of his honour and good name.

### **Federal Criminal Code**

Art. 129: “(1) Defamation, that is the dissemination of knowingly false information that undermines another person’s reputation,” is punishable by a fine of 50 to 100 times the [monthly] minimum labour wage, or by one month of the wages or other income of the convicted person, or by forced labour for 120 to 180 hours, or by correctional labour for up to one year. “(2) Defamation contained in a public speech, public performance or in the mass media,” is punishable by a fine of 100 to 200 times the minimum labour wage, or by one to two months of the wages or other income of the convicted person, or by forced labour for 180 to 240 hours, or by correctional labour for one to two years, or by arrest for three to six months. (3) Accusing a person of having committed a serious crime or a state crime, is punishable by limitation of freedom for up to three years, or by arrest from four to six months, or by up to three years imprisonment.

Art. 130: “(1) Insult, that is the debasement of the honour and dignity of another person, expressed in indecent form,” is punishable by a fine of up to 100 times the [monthly] minimum labour wage, or by one month of the wages or other income of the convicted person, or by compulsory work for up to 120 hours or by correctional work for up to six months. “(2) Insult contained in a public presentation, public performance or the mass media,” is punishable by a fine of up to 200 times the minimum labour wage, or by two months of the wages or other income of the convicted person, or by forced labour for up to 180 hours, or by correctional labour for up to one year.

### **Civil Code**

#### Article 152

##### *Defamation and Business Reputation*

(1) A citizen can demand in a court trial the refutation of the information denigrating his honour and dignity and business reputation, if the person responsible for disseminating this information does not prove that it corresponds to reality. On request of interested persons, the protection of a deceased person’s dignity and honour can be admitted.

(2) If information denigrating a citizen’s honour, dignity and business reputation was disseminated by means of mass media, it shall be refuted in the same means of mass media. If this information is contained in a document which is sent out by an organisation, this document should be changed or withdrawn. In other cases, the court shall determine the way in which this information shall be refuted.

(3) A citizen, whose rights or other interests protected by law have been denigrated by a means of mass media, has the right to reply in the same means of mass media.

(4) If the court decision is not executed, the court can impose a fine on the responsible person to be paid to the State. The amount of the fine is determined by procedural legislation. The fine does not waive the responsible person’s duty to carry out the court decision.

(5) A citizen, whose honour, dignity and business reputation as protected by law have been denigrated by a means of mass media can demand not only the refutation of the information but also compensation of his/her moral damages.

(6) If the person who disseminated the information denigrating the plaintiff’s honour, dignity and business reputation cannot be identified, he has the right to file a law suit to determine that the information does not correspond to reality.

(7) The provisions of this Article about the protection of a citizen’s business reputation apply correspondingly to the protection of the business reputation of a legal entity.

### **Resolution of the Plenum of the Supreme Court of the Russian Federation**

#### **“About some questions arising in the court practice dealing with the defamation cases”**

(2) The term “disseminating information”, denigrating honour, dignity and business reputation of the citizen or organisations ... shall be defined as publishing such information in print media, broadcast media, documentary programmes and other mass media, and as contained in employment references, public speeches, statements addressed to officials, or information disclosed, including orally, to several or even one person. If such information is addressed only to the person it concerns, it shall not be considered as dissemination.



The term “discrediting” information shall be considered as information that does not correspond to reality, denigrates a citizen’s honour and dignity, contains statements which accuse a citizen or an organisation of violating the law or moral principles (such as dishonest act, improper behaviour at work, at home, and other information discrediting business or public activity, reputation, etc.

## **Slovakia**

### **Criminal Code**

aw No. 140/1961 Zb. of the Official Gazette as amended

#### **Third head**

Criminal acts against order in public matters

*Criminal acts against the exercise of functions of organs of state administration and public officers*

Attack on organs of state administration

#### § 154

(2) Gross insults or defamation of an organ of state administration in the exercise of its function or in connection with its function are punishable by up to one year imprisonment or by pecuniary punishment.

#### § 156

(3) Gross insults or defamation of a public officer in the exercise of his/her function or in connection with his/her function are punishable by up to one year imprisonment or by pecuniary punishment.

#### Fifth head

Criminal acts grossly disturbing civic cohabitation

Violence against group of inhabitants and against individual

#### § 206 Defamation

(1) Disseminating false information about another person, able to jeopardize his/her reputation among other citizens, namely to discredit him/her in occupation or disturb his/her family relations or cause other serious damage is punishable by up to two years imprisonment.

(2) By imprisonment from one to five years or by pecuniary punishment or by disqualification shall be punished the perpetrator, if the act stipulated under subparagraph 1 has committed through press, film, radio, television or other similarly effective way.

### **Simple Offences Act**

Law No. 372/1990 of the Official Gazette

#### Article 49

Simple offences against civil cohabitation

1) Simple offence commits anyone who

- a) offends another person by insulting him/her or exposing him/her to ridicule
- 2) This offence may be punished by a fine up to 1 000 Sk.

**Civil Code**

Law No. 40/1964 of the Official Gazette.

## Protection of personality

## Article 11

Any natural person has the right to protection of his or her personality, in particular of his or her life and health, civil and human dignity, privacy, name and personal characteristics.

## Article 13

(1) any natural person has the right to request that unjustified infringement of his or her personal rights should be stopped and the consequences of such infringement eliminated, and to obtain appropriate satisfaction.

(2) In cases when the satisfaction obtained under Article 13 (1) is insufficient, in particular because a person's dignity and position in society has been considerably diminished, the injured person is entitled to compensation for non-pecuniary damage.

**Slovenia****Criminal Code**

Chapter 18 of the Criminal Code (Ur. I. RS., Nos. 63/94, 70/94 – amendments, 23/99) is devoted to criminal offences against the honour and reputation. The object of the legal protection against criminal offences provided in this chapter is the honour, good name and reputation of various subjects.

Five basic criminal offences involving various types of attack against the honour and reputation are defined (Articles 169 to 173 of the Criminal Code). Two alternative penalties of a fine or a prison sentence (of varying lengths) are always provided for. All criminal offences listed below are committed against individuals; however, the criminal offences of insult, slander or defamation can be committed against legal entities or bodies which are not legal entities (for example, state authorities) as well. For any of the first five types of criminal offence from this chapter, prosecution is instigated upon the filing of a private motion. When such actions are committed against a state body or official or a military official in connection with the performance of their office in an individual body, prosecution is instigated at the initiative of the injured party in the case in question. In these cases, prosecution is carried out ex officio, but only provided the injured party has filed a complaint.

## Art. 169: Insult

An insult may be verbal, real or symbolic and must be directed against a specific person. It is committed either verbally or expressed through action and is not supported by fact, which is why it is not permitted to ascertain the truth in the procedure. The second paragraph of Article 169 of the Criminal Code defines so-called “qualified insult”, which is an insult committed through the press, radio, television or other means of mass media; the third paragraph defines exclusion of unlawfulness under certain conditions.

**Art. 170: Libel**

The criminal offence of libel is committed by making assertions or circulating false information about events, characteristics, relationships or situations when the perpetrator is aware that these are false. A prison sentence is prescribed for libel of such a nature when it can have grave consequences for the victim (no alternative penalty of a fine is provided for here).

**Art. 171: Slandorous accusations**

This criminal offence relates to making false assertions and circulating untruths when the perpetrator is unaware that they are false. The perpetrator may during the procedure prove either that the assertions he made were true or that he had justified reasons for believing that what he was asserting or circulating was true.

**Art. 172: Gossiping**

The criminal offence of gossiping encroaches on the most personal sphere of human beings, i.e. their intimate and family lives. With the exception of cases from the fifth paragraph of this Article, it is not permitted to ascertain the truth in the procedure. The fifth paragraph of the Article 172 provides that whoever asserts or circulates any matter concerning the personal or family affairs of another person in the exercise of an official duty, political or other public activity, at the defence of any right or the protection of justified benefits, shall not be punished, provided he proves either the truth of his assertions or that he had reasonable grounds for believing in the truthfulness of what was asserted or circulated.

**Art. 173: Reproaching of a criminal offence**

As indicated, these criminal offences can also be committed against legal entities and state authorities, which is why there should be no need to define special criminal offences to protect the honour and reputation of specific individuals or legal entities. However, the Slovenian Criminal Code defines as criminal special offences committed against the honour and reputation of the Republic of Slovenia, its symbols and the President of the Republic, as well as against the presidents of other countries, their representatives and symbols. The protection provided by the provisions cited herein is narrower in its scope, since criminal offences under Articles 174 to 176 of the Criminal Code need to be committed publicly to be an offence.

**Art. 174: Disparagement of the Republic of Slovenia**

In addition to the Republic of Slovenia, protection against this type of criminal offence is enjoyed by the President of the Republic only and not by other top bodies or their representatives – these are guaranteed protection within the provisions on basic criminal offences. If a criminal offence under Article 174 of the Criminal Code has been committed, the prosecution is instigated *ex officio*.

**Art. 175: Disparagement to a foreign country or international organisation**

Foreign countries, international organisations and their representatives and symbols are afforded the same protection as the Republic of Slovenia and its President; prosecution for such criminal offences can only be instigated by the public prosecutor with the permission of the minister of justice.

Art. 176: Disparagement of the Slovene people or national communities

This Article provides that whoever publicly commits any of the offences under Articles 169 to 173 against the people of Slovenia or against the Hungarian or Italian national communities living in the Republic of Slovenia, shall be punished by a fine or prison sentence of not more than one year.

## **Spain**

### **Criminal Code**

In Spain, defamation is regulated in the Criminal Code of 1995, in its XI Title, under the heading of “Crimes against honour”.

The code distinguishes between calumny (Articles 205- 207) and insult (Articles 208-210).

Calumny (slander) is attributing a crime to another knowing that it is false or with reckless disrespect for the truth. It can be punished with prison sentences between six months and two years or fines.

The defence for a person accused of slander will be proving that the crime was committed. In such cases, the person will be exempted from any penalty.

Insult is harming another person’s dignity, fame or damaging his/her self-esteem. Insult is only considered as a crime when by its nature, effects and circumstances, it is considered as serious. Insult will not be considered serious unless it is committed with knowledge of its falsehood or reckless disrespect for truth.

Serious insult committed with publicity will be punished with fines (of varying amounts).

The person accused of insult will be exempted from all responsibility by proving the truth of the accusations when these were made against civil servants concerning the exercise of their functions or related to administrative infractions.

The general provisions on defamation, applicable to both calumny and insult, appear in Articles 211-216. In these provisions it is, inter alia, stipulated that calumny/insult will be considered public when the accusation was disseminated via the press, broadcasting or similar means. In the latter circumstances, the owner of the media entity can be made jointly responsible (civil responsibility).

## **Sweden**

### **The Freedom of the Press Act**

Chapter 7 on offences against the freedom of the press

Art. 4. With due regard to the purpose of a universal freedom of the press as set forth in Chapter 1, the following acts shall be regarded as offences against the freedom of the press if they are committed by way of printed matter and if they are punishable under law:

14. libel, whereby a person alleges another is a criminal or is blameworthy in his way of life, or otherwise communicates information liable to expose the other to the contempt of others, and, if the person libelled is deceased, to cause offence to his survivors or which might otherwise be considered to violate the sanctity of the grave except, however, in cases in which it is justifiable having regard to the circumstances, or in order to provide information in the matter concerned, and proof is presented that the information was correct or that there were reasonable grounds for it; and
15. insulting words or behaviour, whereby a person insults another by means of offensive invective or allegations or by any other insulting behaviour towards him.

Both criminal and civil actions may be brought under the law on libel. Criminal actions may be brought by either public or private prosecution. Public prosecutions are rare and must be conducted by the Chancellor of Justice. Normally, public prosecutions are only brought when the injured party is a civil servant in this capacity. For example, the Chancellor has prosecuted cases where police officers were libeled in the line of duty. Individuals normally sue jointly for criminal liability and civil damages.

*Opinions.* Opinions or value judgements about a person can never be libelous. If formulated in a very insulting way, they may be judged as an affront (although there are few cases to illustrate this). If an opinion is based on implicitly expressed facts, it may thereby constitute a libel.

*Defence: Truth, Public Interest and Public Figures*

The key issue in many libel actions is whether the publication was “justifiable”. A publication is justifiable when the public interest in the information (not to be confused with the interest of the public or general curiosity) overrides the interest in protecting the person concerned. For example, it would be considered justifiable to publish information about a minor tax fraud committed by a politician, whereas it would be considered unjustifiable to publish the same information concerning a person with no public record.

If the truth is allowed as a defence, the responsible editor bears the burden of proof. It is enough to prove that the responsible editor had reasonable grounds to believe that the information was truthful.

*Institutions.* Companies, organisations and government authorities have no rights under the law of libel. As a result, the press enjoys great freedom in scrutinizing and criticizing government, business corporations, unions and other institutions.

*Invasion of privacy.* Privacy is not explicitly mentioned in the Freedom of Press Act. Indirectly, defamation gives some protection. Stories about private matters are often likely to expose the person in question to the contempt of others and are rarely deemed to be justifiable. However, there is no protection against the publication of photographs of people in private situations, for example, pictures of a well-known person taking a swim in the nude. In such circumstances there is no cause of action under Swedish law.

However, privacy is well protected under the Code of Ethics, although there are many questions about whether the Code provides adequate remedies for aggrieved individuals. For instance, the Press Council has no power to award damages to a successful complainant.

*Insults to government institutions or officials.* There is no criminal law protecting government institutions from insults or libelous statements.

The last remnant of such legislation disappeared in the mid-1970s when a provision which prohibited the “belying of state authority” was abolished on the grounds that, in a democratic society, government institutions should be open and responsive to all criticism, even when based on lies. Although government officials enjoy protection under the law on libel, actions on their behalf are rarely brought.

## Switzerland

### **Criminal Code**

21 December 1937 (as amended at 24 September 2002)

Livre deuxième: Dispositions spéciales

*Titre troisième: Infractions contre l'honneur et contre le domaine secret ou le domaine privé*

#### Art. 173

1. Celui qui, en s'adressant à un tiers, aura accusé une personne ou jeté sur elle le soupçon de tenir une conduite contraire à l'honneur, ou de tout autre fait propre à porter atteinte à sa considération, celui qui aura propagé une telle accusation ou un tel soupçon, sera, sur plainte, puni de l'emprisonnement pour six mois au plus ou de l'amende.
2. L'inculpé n'encourra aucune peine s'il prouve que les allégations qu'il a articulées ou propagées sont conformes à la vérité ou qu'il avait des raisons sérieuses de les tenir de bonne foi pour vraies.
3. L'inculpé ne sera pas admis à faire ces preuves et il sera punissable si ses allégations ont été articulées ou propagées sans égard à l'intérêt public ou sans autre motif suffisant, principalement dans le dessein de dire du mal d'autrui, notamment lorsqu'elles ont trait à la vie privée ou à la vie de famille.
4. Si l'auteur reconnaît la fausseté de ses allégations et les rétracte, le juge pourra atténuer la peine ou exempter le délinquant de toute peine.
5. Si l'inculpé n'a pas fait la preuve de la vérité de ses allégations ou si elles étaient contraires à la vérité ou si l'inculpé les a rétractées, le juge le constatera dans le jugement ou dans un autre acte écrit.

#### Art. 174

- 1.134 Celui qui, connaissant la fausseté de ses allégations, aura, en s'adressant à un tiers, accusé une personne ou jeté sur elle le soupçon de tenir une conduite contraire à l'honneur, ou de tout autre fait propre à porter atteinte à sa considération, celui qui aura propagé de telles accusations ou de tels soupçons, alors qu'il en connaissait l'inanité, sera, sur plainte, puni d'emprisonnement ou d'amende.
2. La peine sera l'emprisonnement pour un mois au moins si le calomniateur a, de propos délibéré, cherché à ruiner la réputation de sa victime.
3. Si, devant le juge, le délinquant reconnaît la fausseté de ses allégations et les rétracte, le juge pourra atténuer la peine. Le juge donnera acte de cette rétractation à l'offensé.

#### Art. 175

- 1 Si la diffamation ou la calomnie vise une personne décédée ou déclarée absente, le droit de porter plainte appartient aux proches du défunt ou de l'absent.
- 2 Toutefois, aucune peine ne sera encourue s'il s'est écoulé plus de trente ans depuis le décès ou la déclaration d'absence.

## Art. 176

A la diffamation et à la calomnie verbale sont assimilées la diffamation et la calomnie par l'écriture, l'image, le geste, ou par tout autre moyen.

## Art. 177

1 Celui qui, de toute autre manière, aura, par la parole, l'écriture, l'image, le geste ou par des voies de fait, attaqué autrui dans son honneur sera, sur plainte, puni d'emprisonnement pour trois mois au plus ou à une amende.

2 Le juge pourra exempter le délinquant de toute peine si l'injurié a directement provoqué l'injure par une conduite répréhensible.

3 Si l'injurié a riposté immédiatement par une injure ou par des voies de fait, le juge pourra exempter de toute peine les deux délinquants ou l'un d'eux.

## Art. 178

1 Pour les délits contre l'honneur, l'action pénale se prescrit par quatre ans

2 L'article 29 demeure applicable en ce qui concerne la plainte.

### **“The Former Yugoslav Republic of Macedonia”**

#### **Criminal Code**

Chapter XVII of the Criminal Code treats defamation as a crime.

Article 172 libel

Article 173 insult; foresees a sentence with a fine or imprisonment.

Article 174 Revealing personal and family matters; provides for criminal liability in cases of insult and defamation.

Article 175 Humiliation with accusations for criminal act

Article 178 injuring the reputation of the Republic of Macedonia

Article 179 Humiliation of the Macedonian people and nationalities

Article 180 Defamation of the reputation of the court

Article 181 Defamation of the reputation of a foreign country

Article 182 Defamation of the reputation of an international organisation

Article 185 foresees the prosecution of crimes against the honour and reputation of a person

1. The prosecution of crimes under Articles from 173-176 is undertaken upon private suit.
2. If the crimes under Articles 173, 174 and 175 were committed against the President of the Republic of Macedonia, regarding the performing of his function, prosecution may be undertaken *ex officio*.
3. If the crimes under Articles 173 to 175 are committed towards a person who is on the list of candidates during elections or directly before voting, at a time when that what was expressed or spread could not be denied publicly, a prosecution is undertaken.
4. If the crimes under Articles 173 to 175 are committed against a state agency or its representative, towards an official or military person, regarding their office or the carrying out of their function, the prosecution is undertaken upon proposal.

Thus, the basic punishment against libel, defamation and blasphemy is a fine or imprisonment. The prosecution is undertaken when a private suit is brought, and if the crime is committed against the President of the country, against a member of the Parliament, against a state agency or its representative, the prosecution is undertaken *ex officio*.

## Ukraine

### **Constitution (1996)**

Chapter II: *Human and Citizens' Rights, Freedoms and Duties*

#### Article 32

Everyone is guaranteed judicial protection of the right to rectify incorrect information about himself or herself and members of his/her family, and of the right to demand that any type of information be expunged, and also the right to compensation for material and moral damages inflicted by the collection, storage, use and dissemination of such incorrect information

### **Criminal Code**

Article 182. *Violation of personal privacy*

The illegal collection, storage, use or dissemination of confidential information about a person without his/her consent, or dissemination of such information in a public speech, publicly demonstrated work, or mass media, shall be punishable by a fine up to 50 tax-free minimum incomes, or correctional labour for a term of up to two years, or arrest for a term of up to six months, or restraint of liberty for a term of up to three years.

Article 338. *Outrage against state symbols*

1. Public outrage against the National Flag of Ukraine, the National Coat of Arms of Ukraine or the National Anthem of Ukraine, shall be punishable by a fine up to 50 tax-free minimum incomes, or arrest for a term up to six months.
2. public outrage against an officially installed or raised flag or coat of arms of a foreign state, shall be punishable by a fine up to 50 tax-free minimum incomes, or arrest for a term up to six months.

### **Civil Code**

Article 7. *Protection of Honour, Dignity and Professional Reputation*

A citizen or an organisation have the right to claim in the court for the refutation of the data, which don't corresponds to reality or are laid down untruthfully, which discredit their honour and dignity or professional reputation or damage their interests, unless the person who disseminated these data proves that they correspond to reality.

If the data, laid down in the first paragraph of this Article, are communicated through the mass media (printed or audiovisual), they should be refuted in the same printed edition, the analogous radio or TV programme or by other adequate means. If the data, which do not correspond to reality and damage the interests, honour, dignity or professional reputation of a citizen or an organisation include a document issued by an organisation, this document should be substituted or withdrawn. In other cases, the order of refutation is established by the court.



A citizen or an organisation, concerning which the information that does not correspond to reality and damage the interests, honour, dignity or professional reputation are communicated, have the right, in addition to refutation of such data, also to claim for the reimbursement of the property and moral (non-property) damage, caused by the dissemination of these data. Limitation of actions for the claims connected with the refutation of these data and compensation of moral damage is one year.

### **Law on Television and Radio Broadcasting**

#### Chapter V Rights of Viewers and Listeners

##### *Article 42. Inadmissibility of Distorting Information*

A person interviewed or a person providing information to a TV/radio company shall have the right to demand in writing that this person be admitted to the preview of the program, and that otherwise this information (interview) be deleted from the program. Disputes arising from violations of the provisos stated in Section 1 herein above shall be settled by a court of law.

##### *Article 43. The Right to Respond, Refute or Give One's Own Interpretation of the Case*

A TV/radio company shall give citizens or proxies of organisations whose interests were damaged by information transmitted by this TV/radio company an opportunity to respond, refute or give their interpretation of the case at issue.

If such information is damaging to citizens' honour and dignity, and if it contains distorted facts, this information, if so demanded by the party concerned, shall be retracted by the transmitting TV/radio company within one month. The form in which this retraction will be rendered and the time shall be agreed between the interested parties.

Disputes arising from the implementation of the above provisos shall be settled by a court of law.

#### Chapter VII Answerability for Breaches of Laws on Television and Radio Broadcasts

##### *Article 47. Compensation for Moral Damage*

Moral (non-property) damage incurred on a citizen by information spread by a TV/radio company which is untrue or damaging to this citizen's honour and dignity, or which causes other non-property damage, shall be made good, if so ruled by a court of law, by this TV/radio company, and by other guilty officials and private citizens. The amount of monetary compensation for moral (non-property) damage shall be determined by court.

##### *Article 48. Release from Answerability for Spreading Distorted Information*

TV/radio companies and their workers shall not be held responsible for dissemination of information found to be untrue if:

- a) This information is contained in an official document;
- b) This data was received from a news agency, governmental press service or citizens' association;
- c) If it is a direct quotation from an appearance of a People's Deputy (MP) or official speech made by a government official;
- d) If this information comes from a TV/radio live coverage.

### **The Law on Printed Mass Communication Media (Press)**

Section III Relations Between Editorial Staffs Of Printed Mass Communication Media And Citizens And Organisations

### Article 37 *Disproof of Information*

Citizens, legal entities and state bodies and legal representatives thereof shall have the right to demand that a printed mass communication medium publish a disproof of information previously published therein that is untruthful or abasing for their honour and dignity.

If the editorial staff of a printed mass communication medium has no evidence proving that the information published therein is truthful, it must publish a disproof in the next planned issue if so demanded by the applicant or otherwise publish it at its own initiative.

The disproof must be printed under the heading "Disproof" in the same font and in the same place as the information being disproved.

The size of a disproof may not be more than twice that of the fragment of the original information that is being disproved. To demand that the size of the disproof be smaller than half of a standard typewritten page shall be prohibited.

A disproof may be published in the form of an answer, the size of which shall not exceed that of the information being disproved.

Making abridgments or other changes in the applicant's text of the disproof without the consent of the applicant.

The editorial staff shall deny disproof if such disproof:

- 1) contradicts the provisions of Article 3 above;
- 2) contradicts a court decision or verdict that has come into effect;
- 3) is anonymous.

The editorial staff may deny disproof if such disproof:

- 1) concerns information that has already been disproved by the editorial staff;
- 2) was received from the applicant more than one year after the publication of the information being disproved.

The editorial staff must, within one month from receipt of the demand, publish the disproof and notify the applicant of the date of such publication or of denial thereof stating the reasons of such denial.

The applicant shall have the right to appeal denial or violation of the procedure of disproof in court. The court shall accept the appeal within one year from the date of publication of the disproof.

## Section V Liability For The Violation Of Freedom Of Printed Mass Communication Media

### Article 42 *Exemption from Liability*

The editorial staff and journalists shall not be liable for publishing information that is untruthful, abasing for the honour and dignity of citizens and organisations, infringes the rights and lawful interests of citizens or abuses the freedom of printed mass communication media and the rights of journalists if such information:

- 1) was received from news agencies or the founder (co-founders);
- 2) is contained in a reply to a request for access to official documents and request for written or oral information provided in accordance with the requirements of Law Ukraine on Information;
- 3) is a word-for-word reproduction of official statements by functionaries of state bodies, organisations and associations of citizens;
- 4) is a word-for-word reproduction of materials published in another printed mass communication medium and contains a reference thereto;
- 5) discloses a secret protected by law but was not obtained illegally by the journalist.

### **The Law on Information**

#### *Article 31 Citizens' Access to Information Relating to these Citizens*

All organisations collecting information relating to the person shall, prior to handling this information, have the relevant databases officially registered, in keeping with procedures established by the Cabinet of Ministers of Ukraine.

The required amount of information relating to the person that can be legally obtained shall be reduced to a minimum and used only for reaching a lawfully set target.

Denial of access to such information, its concealment, or its unlawful collection, use, storage or dissemination may be appealed to the law court.

### **United Kingdom**

Libel actions or civil law suits can follow from a defamation. A statement is defamatory if it brings the plaintiff into hatred, ridicule or contempt.

*Defence.* There are three main positive defences: truth (or “justification”), fair comment and privilege.

Truth is a complete defence. Except where certain old criminal convictions have been published, it is no necessary to show that a true statement was also in the public interest.

“Fair comment” is an important buttress of free speech. Comments can be defended even if the defendant cannot prove that they are true. This makes the boundary between “fact” and “comment” important. The defendant’s comment must be based on a factual foundation. Those facts must be true and must be either set out in the publication itself or referred to with sufficient clarity. Alternatively, the comment must be based on a privileged report which accompanies the defamatory statement.

“Privilege” arises from the law’s recognition that, on particular occasions, it is important for there to be open communication even if this openness is achieved at the cost of damage to reputations. Fair and accurate reports on court proceedings published in a newspaper as soon as possible after the event in question enjoy “absolute privilege”.

A reform of defamation law was introduced by the Defamation Act of 1996. The Act narrowed and clarified the responsibility for publication of statements by exempting persons from liability who can show that they were neither author, editor or publisher of the statement in question, that they took reasonable care when publishing, and that they did not know that their publication would include defamatory statements.

*Insults to government officials or institutions*

The offence of seditious libel is now most unlikely to be used against journalists. Sedition has been defined as speech intended to stir up tumult and disorder for the purpose of disturbing constitutional authority.

There are no laws in the United Kingdom making it a crime to insult the Head of State or the flag.

**Serbia and Montenegro****Criminal Code**

Art. 157: "One who brings into derision the Federal Republic of Yugoslavia (FRY), its flag, coat of arms or national song, the President of FRY, President of the Federal Parliament, the Federal Parliament, Federal Government or Federal Army in connection with the performance of their official duties shall be punished by up to three years imprisonment." An insult to a government official or institution is not punishable if it is done "in a serious scientific, literary or artistic work or a serious critique, or during the performance of an official duty, journalistic task, political or other social function, or in defence of some right or in protection of justifiable interests if it is obvious from the expression or other circumstances that the insult was not done for purposes of disparagement or if the accused proves the truth of his claims or that he had serious reason to believe the truth of what he made public."

Art. 158: "One who brings into derision a foreign state, its flag, coat of arms or national song, a foreign head of state or foreign diplomatic representative in the FRY shall be punished by up to three years imprisonment."

Art. 159: "One who brings into derision the United Nations, International Red Cross or any other international organisation recognized by the FRY or a representative of such an international organisation shall be punished by up to three years imprisonment." Art. 160: "Prosecutions for offences under Arts. 158 and 159 shall be instituted upon authorisation of the federal prosecutor."

Art. 169: (1) Asserting or circulating "false statements capable of damaging the honour and reputation of another person," is punishable by a fine or up to six months imprisonment. (2) Defamation "committed through the medium of the press, radio, television or similar media, or at a public assembly," is punishable by up to one year imprisonment. (3) If the defamation "produced or might have produced grave consequences to the victim," punishment shall be not less than three months imprisonment. (4) "If the defendant proves the truth of his allegation or the existence of reasonable grounds for his belief in the veracity of the matter asserted or circulated, he shall not be punished for defamation but may be punished for insult (Art. 170) or for disparagement through reproach for commission of a criminal offence (Art. 172)." (5) Falsely asserting that another person has committed a criminal offence is punishable as defamation even if the defendant had "reasonable grounds to believe the veracity" of the assertion, except as provided in Art. 173 (2). The truth of an allegation that someone has committed a criminal offence "may be proved by a final judgment, and by other evidence only when prosecution or trial is impossible or forbidden."

Art. 170: (1) Insulting another person is punishable by a fine or up to three months imprisonment. (2) Insult "committed through the medium of the press, radio, television or similar media, or at a public assembly," is punishable by a fine or up to six months imprisonment.

Art. 171: (1) Asserting or circulating “a matter concerning the personal or family life of a person, which is capable of causing damage to his reputation,” is punishable by a fine or up to six months imprisonment. (2) If the offence is “committed through the medium of the press, radio, television or similar media, or at a public assembly,” punishment is up to one year imprisonment. (3) If the assertion “has produced or might have produced grave consequences to the victim,” punishment is not less than three months imprisonment. (4) The truth or falsity of the assertion “may not be subject to proof” except as provided in Art. 173(3).

Art. 172: “Whoever with intent to disparage another reproaches him with having committed a criminal offence or with having been convicted of a criminal offence, or whoever with the same intent communicates the same matter to someone,” is punishable by a fine or not less than three months imprisonment.

Art. 173: (1) Insult committed “in a serious scientific, literary or artistic work or a serious critique, or during the performance of an official duty, journalistic task, political or other social function, or in defence of some right or in protection of justifiable interests is not punishable unless it is obvious from the manner of expression or circumstances that the insult was done for purposes of disparagement.” (2) Under the circumstances listed in the preceding paragraph, accusing a person of having committed a crime is not punishable under Art. 169 (5) if the defendant “proves the existence of reasonable grounds for his belief in the truth” of the allegation. (3) Assertions of personal or family conditions are not punishable if “made in the performance of an official duty, political or other social function, or in defending a right or protecting a justifiable interest, provided the defendant proves the allegations or the existence of reasonable grounds for his belief in the veracity of the assertions.”

Art. 173a: (1) Provides for “judicial admonition” instead of other penalties for violations of Arts. 169-172 under certain circumstances, including provocation and a willingness by the defendant to apologize or issue a retraction. (2) If an insulted person returns the insult, the court can punish either or both parties or admonish them.

## **Serbia**

Many of the provisions in the repressive 1998 Public Information Law were found to be unconstitutional and the law was repealed in February 2001.

Criminal defamation laws remain in force.

### **Criminal Code**

Article 92 regarding libel and slander, provides for a prison sentence for anyone who “discloses or circulates any untrue material about a person, which can harm that person’s honour and reputation.”

Article 93 states that “anyone who insults another” is liable to imprisonment.

Article 94 provides for a prison sentence for anyone who discloses or circulates information about a person’s private life that could be harmful to the “honour and reputation” of that person.

Article 96 lists a number of provisions under which individuals are exempt from punishment for expressing their opinions if there was no intention to insult, including, for example, where the context is an individual carrying out “scientific or artistic work”.

Article 98 provides for imprisonment for “anyone who publicly declares scorn for the Republic of Serbia or another republic of Federal Republic of Yugoslavia, their flag, coat of arms or anthem, or the president of the republic, the parliament and the government, the head of the parliament or the president, related to the performances of his duties”.

## **Montenegro**

### **Criminal Code**

In Montenegro, defamation continues to be a criminal offence.

Article 76 of the Criminal Code provides for a fine of up to six months imprisonment for damaging the honour or reputation of a person; this is increased to up to one year in prison if the damaging information is disseminated through the media.

Article 77 of the Criminal Code provides for imprisonment of up to three months for insult and again increases this term to six months if the alleged insult is disseminated via the media.

## **II. The dissemination of information and opinions in the media about political figures and public officials: Collection of case-law of the European Court of Human Rights, Secretariat Memorandum prepared by the Directorate General of Human Rights**

### Introduction:

This document reproduces a collection of case-law of the European Court of Human Rights concerning the dissemination of information and opinions in the media about political figures and public officials.

### **1. The case of *Lingens v. Austria* (Application No. 9815/82), of 8 July 1986:**

*Background:* Fining the applicant for having defamed an Austrian politician in a newspaper article; Article 111 of the Austrian Criminal Code; violation of Article 10

§ 41 [T]he Court has to recall that freedom of expression, as secured in paragraph 1 of Article 10 (art. 10-1), constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment. Subject to paragraph 2 (art. 10-2), it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". These principles are of particular importance as far as the press is concerned. Whilst the press must not overstep the bounds set, inter alia, for the "protection of the reputation of others", it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. In this connection, the Court cannot accept the opinion, expressed in the judgment of the Vienna Court of Appeal, to the effect that the task of the press was to impart information, the interpretation of which had to be left primarily to the reader.

§ 42 Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society, which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 (art. 10-2) enables the reputation of others – that is to say, of all individuals – to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.

§ 46 In the Court's view, a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof. The Court notes in this connection that the facts on which Mr. Lingens founded his value-judgment were undisputed, as was also his good faith.

**2. The case of Oberschlick v. Austria No.1 (Application No. 11662/85), of 23 May 1991:**

*Background:* Libel action brought against the applicant by an Austrian politician and subsequent conviction of the applicant; violation of Article 10

§ 58 These principles are of particular importance with regard to the press. Whilst it must not overstep the bounds set, inter alia, for “the protection of the reputation of others”, its task is nevertheless to impart information and ideas on political issues and on other matters of general interest. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. This is underlined by the wording of Article 10 (art. 10) where the public's right to receive information and ideas is expressly mentioned. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.

§ 59 The limits of acceptable criticism are accordingly wider with regard to a politician acting in his public capacity than in relation to a private individual. The former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism. A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of open discussion of political issues.

§ 60 The Court's task in this case has to be seen in the light of these principles. What are at stake are the limits of acceptable criticism in the context of public debate on a political question of general interest. In such cases the Court has to satisfy itself that the national authorities did apply standards which were in conformity with these principles and, moreover, that in doing so they based themselves on an acceptable assessment of the relevant facts.



§ 61 The applicant was convicted for having reproduced in Forum the text of a criminal information which he and other persons had laid against Mr Grabher-Meyer. During an election campaign, this politician had made certain public statements, reported in a television programme, concerning foreigners' family allowances, and proposed that such persons should receive less favorable treatment than Austrians. The applicant had expressed the opinion that this proposal corresponded to the philosophy and the aims of National Socialism as stated in the NSDAP Manifesto of 1920. The Court agrees with the Commission that the insertion of the text of the said information in Forum contributed to a public debate on a political question of general importance. In particular, the issue of different treatment of nationals and foreigners in the social field has given rise to considerable discussion not only in Austria but also in other member States of the Council of Europe. Mr Oberschlick's criticisms, as the Commission pointed out, sought to draw the public's attention in a provocative manner to a proposal made by a politician which was likely to shock many people. A politician who expresses himself in such terms exposes himself to a strong reaction on the part of journalists and the public.

§ 63 The Court can regard the latter part of the information [in the article in question] only as a value-judgment, expressing the opinion of the authors as to the proposal made by this politician, which opinion was clearly presented as derived solely from a comparison of this proposal with texts from the National Socialist Party Manifesto. It follows that Mr Oberschlick had published a true statement of facts followed by a value-judgment as to those facts. The Austrian courts held, however, that he had to prove the truth of his allegations. As regards value-judgments this requirement is impossible of fulfillment and is itself an infringement of freedom of opinion.

### **3. The case of Castells v. Spain (Application No. 11798/85), of 25 June 1992:**

*Background:* Conviction of a militant Basque politician for publication of an article hostile to the Government; violation of Article 10

§ 43 In this respect, the pre-eminent role of the press in a State governed by the rule of law must not be forgotten. Although it must not overstep various bounds set, inter alia, for the prevention of disorder and the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.

### **4. The case of Thorgeirson v. Iceland (Application No. 13778/88), of 25 June 1992:**

*Background:* Applicant fined for publication in a newspaper of two articles concerning police brutalities; violation of Article 10

§ 63 The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.

Freedom of expression, as enshrined in Article 10 (art. 10), is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established. In the present case, the applicant expressed his views by having them published in a newspaper. Regard must therefore be had to the pre-eminent role of the press in a State governed by the rule of law. Whilst the press must not overstep the bounds set, inter alia, for “the protection of the reputation of ...others”, it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog”.

§ 64 On the questions of general principle raised by the Government, the Court observes that there is no warrant in its case-law for distinguishing, in the manner suggested by the Government, between political discussion and discussion of other matters of public concern. Their submission which seeks to restrict the right to freedom of expression on the basis of the recognition in Article 10 (art. 10) that the exercise thereof “carries with it duties and responsibilities” fails to appreciate that such exercise can be restricted only on the conditions provided for in the second paragraph of that Article (art. 10-2).

§ 65 In short, the applicant was essentially reporting what was being said by others about police brutality. He was convicted by the Reykjavik Criminal Court of an offence under Article 108 of the Penal Code partly because of failure to justify what it considered to be his own allegations, namely that unspecified members of the Reykjavik police had committed a number of acts of serious assault resulting in disablement of their victims, as well as forgery and other criminal offences. In so far as the applicant was required to establish the truth of his statements, he was, in the Court’s opinion, faced with an unreasonable, if not impossible task.

##### **5. The case of Schwabe v. Austria (Application No. 13704/88), of 28 August 1992:**

*Background:* Applicant’s conviction for defamation and for having reproached a political person for an offence for which he had already served his sentence; violation of Article 10

§ 32 A politician’s previous criminal convictions of the kind at issue here, together with his public conduct in other respects, maybe relevant factors in assessing his fitness to exercise political functions.

§ 34 The applicant’s conviction for defamation stemmed, according to the Austrian courts, from the fact that he failed to prove the truth of his statement. They interpreted the words “while under the influence of alcohol”, appearing in the press release, as meaning an alcohol content of 0.8 per mille or more, on the basis of the comparison made with Mr Tomaschitz’s accident. The Court does not, however, consider it established that the applicant’s statement about Mr Frühbauer’s alcohol consumption was misleading. It moreover points out that the two accidents were not the subject of direct comparison but were mentioned only in relation to the different attitude of Mr Wagner towards them. It is significant that the applicant described both accidents in completely different terms. He nevertheless concluded that they had enough features in common to warrant the resignation of both the politicians concerned. The impugned comparison thus essentially amounted to a value-judgment, for which no proof of truth is possible.

The Court notes in this connection that the facts on which the applicant based his value-judgment were substantially correct and his good faith does not give rise to serious doubts. He cannot be considered to have exceeded the limits of freedom of expression.

**6. The case of Prager and Oberschlick v. Austria (Application No. 15974/90), of 26 April 1995:**

*Background:* Conviction for defamation on the grounds of critical remarks made about several judges and confiscation of copies of the publication); non-violation of Article 10

§ 34 The Court reiterates that the press plays a pre-eminent role in a State governed by the rule of law. Although it must not overstep certain bounds set, inter alia, for the protection of the reputation of others, it is nevertheless incumbent on it to impart – in a way consistent with its duties and responsibilities – information and ideas on political questions and on other matters of public interest. This undoubtedly includes questions concerning the functioning of the system of justice, an institution that is essential for any democratic society. The press is one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them. Regard must, however, be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticized are subject to a duty of discretion that precludes them from replying.

**7. The case of Wingrove v. the United Kingdom (Application No. 17419/90), of 25 November 1996:**

*Background:* refusal by the British Board of Film Classification to grant a classification certificate to a film which it considered to be blasphemous); non-violation of Article 10

§ 58 Whereas there is little scope under Article 10 para. 2 of the Convention (art. 10-2) for restrictions on political speech or on debate of questions of public interest, a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of “the protection of the rights of others” in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations.

**8. The case of De Haes and Gijssels v. Belgium (Application No. 19983/92), of 24 February 1997:**

*Background:* Order for two journalists to pay damages for libel in respect of several judges; violation of Article 10

§ 36 The Government maintained that, far from stimulating discussion of the functioning of the system of justice in Belgium, the impugned press articles had contained only personal insults directed at the Antwerp judges and Advocate-General and had therefore not deserved the enhanced protection to which political views were entitled. No immunity could be claimed for opinions expressed by journalists merely on the ground that the accuracy of those opinions could not be verified. In the instant case the authors of the articles had incurred a penalty for having exceeded the limits of acceptable criticism. It would have been quite possible to challenge the way the courts had dealt with Mr X's cases without at the same time making a personal attack on the judges and Advocate-General concerned and accusing them of bias and of showing "a lack of independence". In that connection, it also had to be borne in mind that the duty of discretion laid upon magistrates prevented them from reacting and defending themselves as, for example, politicians did.

§ 37 The Court reiterates that the press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest, including those relating to the functioning of the judiciary. The courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence. They must accordingly be protected from destructive attacks that are unfounded, especially in view of the fact that judges are subject to a duty of discretion that precludes them from replying to criticism. In this matter as in others, it is primarily for the national authorities to determine the need for an interference with the exercise of freedom of expression. What they may do in this connection is, however, subject to European supervision embracing both the legislation and the decisions applying it, even where they have been given by an independent court.

§ 47 Looked at against the background of the case, the accusations in question amount to an opinion, whose truth, by definition, is not susceptible of proof. Such an opinion may, however, be excessive, in particular in the absence of any factual basis, but it was not so in this instance; in that respect the present case differs from the Prager and Oberschlick case.

**9. The case of Oberschlick v. Austria No. 2 (Application No. 20834/92), of 1 July 1997:**

*Background:* Conviction for insulting a politician; violation of Article 10

§ 33 In the Court's view, the applicant's article, and in particular the word *Trottel*, may certainly be considered polemical, but they did not on that account constitute a gratuitous personal attack as the author provided an objectively understandable explanation for them derived from Mr Haider's speech, which was itself provocative.

As such they were part of the political discussion provoked by Mr Haider's speech and amount to an opinion, whose truth is not susceptible of proof. Such an opinion may, however, be excessive, in particular in the absence of any factual basis, but in the light of the above considerations that was not so in this instance.

§ 34 It is true that calling a politician a *Trottel* in public may offend him. In the instant case, however, the word does not seem disproportionate to the indignation knowingly aroused by Mr Haider. As to the polemical tone of the article, which the Court should not be taken to approve, it must be remembered that Article 10 (art. 10) protects not only the substance of the ideas and information expressed but also the form in which they are conveyed.

**10. The case of Schöpfer v. Switzerland (Application No. 25405/94), of 20 May 1998:**

*Background:* Disciplinary penalty imposed by the Bar association on lawyer following criticisms of the judiciary made at a press conference, concerning the detention of one of its client; non-violation of Article 10

§ 33 It is true that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. It also goes without saying that freedom of expression is secured to lawyers too, who are certainly entitled to comment in public on the administration of justice, but their criticism must not overstep certain bounds. In that connection, account must be taken of the need to strike the right balance between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession. Because of their direct, continuous contact with their members, the Bar authorities and a country's courts are in a better position than an international court to determine how, at a given time, the right balance can be struck. That is why they have a certain margin of appreciation in assessing the necessity of an interference in this area, but this margin is subject to European supervision as regards both the relevant rules and the decisions applying them.

**11. The case of Incal v. Turkey (Application No. 22678/93), of 9 June 1998:**

*Background:* Conviction for participating in the preparation of a leaflet criticising the local authority policy concerning workers, particularly those of Kurdish origin; violation of Article 10

§ 53 The freedom of political debate is undoubtedly not absolute in nature. A Contracting State may make it subject to certain "restrictions" or "penalties", but it is for the Court to give a final ruling on the compatibility of such measures with the freedom of expression enshrined in the Convention. In the present case the Government pleaded the "duties" and "responsibilities" with which Article 10 links exercise of the freedom of expression. However, these do not dispense with the obligation to ensure that an interference satisfies the requirements of paragraph 2.

§ 54 The limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion.

Furthermore, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks.

**12. The case of Fressoz and Roire v. France (Application no. 29183/95), of 21 January 1999:**

*Background:* Conviction for unlawful possession of photocopies of Inland Revenue documents (income tax returns) following publication by the satirical weekly *Canard Enchaîné* of details of the salary of the chairman of Peugeot motor cars; violation of Article 10

§ 50 The Court is unconvinced by the Government's argument that the information was not a matter of general interest. The article was published during an industrial dispute – widely reported in the press – at one of the major French car manufacturers. The workers were seeking a pay rise which the management were refusing. The article showed that the company chairman had received large pay increases during the period under consideration while at the same time opposing his employees' claims for a rise. By making such a comparison against that background, the article contributed to a public debate on a matter of general interest. It was not intended to damage Mr Calvet's reputation but to contribute to the more general debate on a topic that interested the public. The Court of Cassation has held that questions relating to the finances of public figures, such as heads of major companies, do not concern their private life. That is not something the [French] Government disputed.

§ 52 Admittedly, people exercising freedom of expression, including journalists, undertake "duties and responsibilities" the scope of which depends on their situation and the technical means they use. In the present case the Court of Appeal held that in the light of the nature of the documents and of the checks, which Mr Roire says, he carried out, the defendants must have known that the documents came from a tax file and were therefore confidential. While recognising the vital role played by the press in a democratic society, the Court stresses that journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection. Indeed, paragraph 2 of Article 10 defines the boundaries of the exercise of freedom of expression. It falls to be decided whether, in the particular circumstances of the case, the interest in the public's being informed outweighed the "duties and responsibilities" the applicants had as a result of the suspect origin of the documents that were sent to them.

§ 54 If, as the Government accepted, the information about Mr Calvet's annual income was lawful and its disclosure permitted, the applicants' conviction merely for having published the documents in which that information was contained, namely the tax assessments, cannot be justified under Article 10. In essence, that Article leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility. It protects journalists' rights to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism.

**13. The case of Janowski v. Poland (Application No. 25716/94), of 21 January 1999:**

*Background:* Conviction of a journalist who joined in an altercation between police officers and fruit sellers; non-violation of Article 10

§ 28 The Commission considered that civil servants acting in an official capacity were, like politicians, subject to the wider limits of acceptable criticism. If they act without a legal basis they should expect criticism from citizens and must accept that it may sometimes be harsh or expressed in a strong form. The applicant might have offended the guards by calling them “oafs” and “dumb”. However, in the particular circumstances of the case, namely the fact that he had spontaneously reacted to unjustified actions by the guards out of genuine civic considerations and expressed his criticism in the course of a heated exchange, he had not overstepped the limits of acceptable criticism. Furthermore, the Commission pointed out that the national authorities had convicted the applicant solely on the basis of the insulting meaning of the two words used by him without taking into account the situation which had provoked his reaction. It concluded that, as the applicant’s conviction was not proportionate to the legitimate aim pursued and was not necessary in a democratic society, there had been a violation of Article 10. The Delegate of the Commission added that in a democratic society citizens should be allowed to react to the conduct of civil servants even if their reactions were not justified and took controversial forms. Moreover, law enforcement officers should be indifferent to offensive verbal responses to their actions since they constitute a part of their professional risk.

§ 32 In this connection the Court notes that the applicant was convicted of insulting the municipal guards by calling them “oafs” and “dumb” during an incident which took place in a square. It was witnessed by bystanders and concerned the actions of municipal guards who insisted that street vendors trading in the square move to another venue. The applicant’s remarks did not therefore form part of an open discussion of matters of public concern; neither did they involve the issue of freedom of the press since the applicant, although a journalist by profession, clearly acted as a private individual on this occasion. The Court further observes that the applicant’s conviction was based on his utterance of the two words which were judged to be insulting by both trial and appeal courts, not the fact that he had expressed opinions critical of the guards or alleged that their actions were unlawful. In these circumstances the Court is not persuaded by the applicant’s contention that his conviction was widely considered as an attempt by the authorities to restore censorship and constituted discouragement of the expression of criticism in future.

§ 33 The Court also notes the Commission’s reasoning that civil servants acting in an official capacity are, like politicians, subject to the wider limits of acceptable criticism. Admittedly those limits may in some circumstances be wider with regard to civil servants exercising their powers than in relation to private individuals. However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions. What is more, civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty.

In the present case the requirements of such protection do not have to be weighed in relation to the interests of the freedom of the press or of open discussion of matters of public concern since the applicant's remarks were not uttered in such a context.

**14. The case *Bladet Tromsø and Stensaas v. Norway* (Application No. 21980/93), of 20 May 1999:**

*Background:* Conviction, on the strength of an official report which had not been made public, of a newspaper and its chief editor to damages for defamation, following the publication of statements concerning alleged violations of seal hunting regulations; violation of Article 10

§ 65 Article 10 of the Convention does not, however, guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article the exercise of this freedom carries with it “duties and responsibilities”, which also apply to the press. These “duties and responsibilities” are liable to assume significance when, as in the present case, there is question of attacking the reputation of private individuals and undermining the “rights of others”. As pointed out by the Government, the seal hunters’ right to protection of their honour and reputation is itself internationally recognised under Article 17 of the International Covenant on Civil and Political Rights. Also of relevance for the balancing of competing interests which the Court must carry out is the fact that under Article 6 § 2 of the Convention the seal hunters had a right to be presumed innocent of any criminal offence until proven guilty. By reason of the “duties and responsibilities” inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.

§ 66 The Court notes that the expressions in question consisted of factual statements, not value-judgments. They did not emanate from the newspaper itself but were based on or were directly quoting from the Lindberg report, which the newspaper had not verified by independent research. It must therefore be examined whether there were any special grounds in the present case for dispensing the newspaper from its ordinary obligation to verify factual statements that were defamatory of private individuals. In the Court's view, this depends in particular on the nature and degree of the defamation at hand and the extent to which the newspaper could reasonably regard the Lindberg report as reliable with respect to the allegations in question. The latter issue must be determined in the light of the situation as it presented itself to *Bladet Tromsø* at the material time, rather than with the benefit of hindsight, on the basis of the findings of fact made by the Commission of Inquiry a long time thereafter.

§ 72 Having regard to the various factors limiting the likely harm to the individual seal hunters’ reputation and to the situation as it presented itself to *Bladet Tromsø* at the relevant time, the Court considers that the paper could reasonably rely on the official Lindberg report, without being required to carry out its own research into the accuracy of the facts reported. It sees no reason to doubt that the newspaper acted in good faith in this respect.



§ 73 On the facts of the present case, the Court cannot find that the crew members' undoubted interest in protecting their reputation was sufficient to outweigh the vital public interest in ensuring an informed public debate over a matter of local and national as well as international interest.

**15. The case Ceylan v. Turkey (Application No. 23556/94), of 8 July 1999:**

*Background:* Conviction of a member of a trade union for incitement to hatred following the publication of criticisms of State policy in south-east Turkey; violation of Article 10

§ 36 The Court observes, however, that the applicant was writing in his capacity as a trade-union leader, a player on the Turkish political scene, and that the article in question, despite its virulence, does not encourage the use of violence or armed resistance or insurrection. In the Court's view, this is a factor which it is essential to take into consideration.

§ 37 ...[I]n this connection, the Court points out that the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference.

**16. The case Karatas v. Turkey (Application No. 23168/94), of 8 July 1999:**

*Background:* Conviction for disseminating propaganda against the integrity of the state; violation of Article 10

§ 50 In the instant case, the poems had an obvious political dimension. Using colourful imagery, they expressed deep-rooted discontent with the lot of the population of Kurdish origin in Turkey. In that connection, the Court recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest. Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks. Finally, where such remarks constitute an incitement to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.

§ 52 The Court observes, however, that the applicant is a private individual who expressed his views through poetry – which by definition is addressed to a very small audience – rather than through the mass media, a fact which limited their potential impact on “national security”, “[public] order” and “territorial integrity” to a substantial degree.

Thus, even though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation.

Furthermore, the Court notes that Mr Karataş was convicted by the Ankara National Security Court not so much for having incited violence, but rather for having disseminated separatist propaganda by referring to a particular region of Turkey as “Kurdistan” and for having glorified the insurrectionary movements in that region.

**17. The case of Okçuoglu v. Turkey (Application No. 24246/94), of 8 July 1999:**

*Background:* Conviction for disseminating propaganda against the integrity of the state; violation of Article 10

§ 44 Since the applicant was convicted of disseminating separatist propaganda through the medium of a periodical, the impugned interference must also be seen in the context of the essential role of the press in ensuring the proper functioning of political democracy. While the press must not overstep the bounds set, *inter alia*, for the protection of vital interests of the State such as national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.

**18. The case of Sürek and Özdemir v. Turkey (Application No. 23927/94 and 24277/94), of 8 July 1999:**

*Background:* Conviction for disseminating propaganda against the integrity of the State and incitement to terrorism following publication of an interview of a member of the PKK; violation of Article 10

§ 58 Since the applicants were convicted of publishing declarations of terrorist organisations and disseminating separatist propaganda through the medium of the review of which they were the owner and editor respectively, the impugned interferences must also be seen in the context of the essential role of the press in ensuring the proper functioning of political democracy. While the press must not overstep the bounds set, *inter alia*, for the protection of vital interests of the State such as national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.

§ 63 The Court stresses that the “duties and responsibilities” which accompany the exercise of the right to freedom of expression by media professionals assume special significance in situations of conflict and tension. Particular caution is called for when consideration is being given to the publication of the views of representatives of organisations which resort to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence. At the same time, where such views cannot be categorised as such, Contracting States cannot with reference to the protection of territorial integrity or national security or the prevention of crime or disorder restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.

**19. The case of Sürek v. Turkey No. 1 (Application No. 26682/95), of 8 July 1999:**

*Background:* Conviction for disseminating propaganda against the integrity of the state; non-violation of Article 10

§ 63 While it is true that the applicant did not personally associate himself with the views contained in the letters, he nevertheless provided their writers with an outlet for stirring up violence and hatred. The Court does not accept his argument that he should be exonerated from any criminal liability for the content of the letters on account of the fact that he only has a commercial and not an editorial relationship with the review. He was an owner and as such had the power to shape the editorial direction of the review. For that reason, he was vicariously subject to the “duties and responsibilities” which the review’s editorial and journalistic staff undertake in the collection and dissemination of information to the public and which assume an even greater importance in situations of conflict and tension.

**20. The case of Sürek v. Turkey No. 2 (Application No. 24122/94), of 8 July 1999:**

*Background:* Conviction for publishing in a periodical the names of officials responsible for combating terrorism; violation of Article 10

§ 36 The Court notes that the applicant’s conviction and sentence had been imposed on the ground that his review had published a news report identifying certain officials with certain statements suggesting misconduct on their part. While it is true that the applicant did not personally associate himself with the information contained in the news report, the Court does not accept his argument that he should be exonerated from any criminal liability for their contents on account of the fact that he only had a commercial and not an editorial relationship with the review. He was an owner and as such had the power to shape the editorial direction of the review. For that reason, he was vicariously subject to the “duties and responsibilities” which the review’s editorial and journalist staff undertake in the collection and dissemination of information to the public and which assume an even greater importance in situations of conflict and tension.

§ 39 As regards the further question whether the reasons relied on could also be considered sufficient, the Court observes that the contested interference related to journalistic reporting of statements made by certain politicians to the press concerning their visit to an area of Turkey where tensions had occurred. The impugned news report simply reiterated what a police officer and a gendarme officer were said to have ordered or affirmed on specific occasions.

Assuming that the assertions were true, the Court considers that, in view of the seriousness of the misconduct in question, the public had a legitimate interest in knowing not only the nature of the conduct but also the identity of the officers. However, the defences of truth and public interest could not have been pleaded under the relevant Turkish law.

**21. The case of Sürek v. Turkey No. 4 (Application No. 24762/94), of 8 July 1999:**

*Background:* Prosecution following a publication challenging the integrity of the State; violation of Article 10

§ 60 The Court stresses that the “duties and responsibilities” which accompany the exercise of the right to freedom of expression by media professionals assume special significance in situations of conflict and tension. Particular caution is called for when consideration is being given to the publication of views of representatives of organisations which resort to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence. At the same time, where such views cannot be categorised as such, Contracting States cannot with reference to the protection of territorial integrity or national security or the prevention of crime or disorder restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.

**22. The case of Dalban v. Romania (Application No. 28114/95), of 28 September 1999:**

*Background:* Conviction for defamation following publication by a journalist of several articles accusing public figures of involvement in fraud; violation of Article 10

§ 50 In the instant case the Court, like the Commission, observes that there is no proof that the description of events given in the articles was totally untrue and was designed to fuel a defamation campaign against G.S. and Senator R.T. Mr Dalban did not write about aspects of R.T.’s private life, but about his behaviour and attitudes in his capacity as an elected representative of the people. The manner in which the applicant expressed his opinion of the senator’s practices and the way in which the latter was carrying out his duties as an elected representative was held by the national courts not to reflect reality and, therefore, to be defamatory.

§ 52 The Court takes notice of this [Government’s actions before the Court] and decides that, in relation to the legitimate aim pursued, convicting Mr Dalban of a criminal offence and sentencing him to imprisonment amounted to disproportionate interference with the exercise of his freedom of expression as a journalist.

**23. The case of Nilsen and Johnsen v. Norway (Application No. 23118/93), of 25 November 1999:**

*Background:* Representatives of police trade union organizations successfully prosecuted for defamation following comments they made about certain publications reporting police brutality; violation of Article 10

§ 50 On the other hand, unlike the national courts, the Court does not consider that [applicant's] statements were imputing improper motives or intentions to Mr Bratholm, they should be regarded as allegations of fact requiring the applicants to prove their truth. From the wording of the statements and the context, it was apparent that they were intended to convey the applicants' own opinions and were thus rather akin to value-judgments.

§ 52 ...[T]he Court considers that, in weighing the interests of free speech against those of protection of reputation under the necessity test in Article 10 § 2 of the Convention, greater weight should be attached to the plaintiff's own active involvement in a lively public discussion, than was done by the national courts when applying national law. The statements at issue were directly concerned with the plaintiff's contribution to that discussion. In the Court's view, a degree of exaggeration should be tolerated in the context of such a heated and continuing public debate of affairs of general concern, where on both sides professional reputations were at stake.

§ 53 Against this background, notwithstanding the Norwegian courts' conclusions under domestic law, the Court is not satisfied that [applicant's] statements exceeded the limits of permissible criticism for the purposes of Article 10 of the Convention. At the heart of the long and heated public discussion was the question of the truth of allegations of police violence and there was factual support for the assumption that false allegations had been made by informers. The statements in question essentially addressed this issue and the admittedly harsh language in which they were expressed was not incommensurate with that used by the injured party who, since an early stage, had participated as a leading figure in the debate. Accordingly, the Court finds that the resultant interference with the applicants' exercise of their freedom of expression was not supported by sufficient reasons in terms of Article 10 and was disproportionate to the legitimate aim of protecting the reputation [of others].

### **III. Journalists should not be imprisoned for what they write, say OSCE and Council of Europe**

(Prepared by: the Organization for Security and Co-operation in Europe, Representative on Freedom of Media)

BELGRADE, 16 December 2002 – The OSCE and the Council of Europe responded to the imposition of a one-month prison term on a former editor-in-chief of the Montenegrin daily “Dan” by sending a letter to the authorities of the Federal Republic of Yugoslavia (FRY) and Montenegro.

“In order for society to preserve freedom of the media, cases of libel or slander against journalists should be dealt with by a civil court, but should in no circumstances result in a penal sanction,” the letter said.

The joint letter of the OSCE Representative on Freedom of the Media, the OSCE Mission to the FRY and the Council of Europe was addressed to FRY Foreign Minister, Goran Svilanovic, and Acting President of Montenegro and Speaker of the Montenegrin Assembly, Filip Vujanovic.

The letter pointed out that freedom of the media is a generally accepted international legal norm and, therefore, journalists must not be imprisoned simply for what they write. Furthermore, so as to prevent the possibility of journalists being imprisoned in future, the OSCE and

Council of Europe also urge the Montenegrin authorities to carry out an early revision of the Montenegrin Criminal Justice legislation to decriminalize the offences of slander and libel brought against journalists.

The letter was signed by the OSCE Representative on Freedom of the Media, Freimut Duve, the Acting Head of the OSCE Mission to the Federal Republic of Yugoslavia, Mark G. Davison, and the Council of Europe Special Envoy for the FRY, Verena Taylor.

It follows a similar request made to the Serbian authorities following a recent case of criminal libel brought against the former Chief Editor and General Manager of the Belgrade weekly "NIN".

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